

No. 3659

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

OLLIE N. McNAUGHT,
Plaintiff in Error,

vs.

SADIE HOFFMAN,
Defendant in Error.

TRANSCRIPT OF RECORD

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT, DISTRICT OF
MONTANA.

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Names and Addresses of Attorneys of Record:

Messrs. McINTIRE & MURPHY, of Helena, Montana,

Attorneys for Plaintiff in Error.

Messrs. BELDEN & DeKALB, of Lewistown, Montana,

Messrs. GUNN, RASCH & HALL, of Helena, Montana,

Attorneys for Defendant in Error.

*In the District Court of the United States, District of
Montana, Helena Division.*

OLLIE N. McNAUGHT,

Plaintiff,

vs.

SADIE HOFFMAN,

Defendant

COMPLAINT

I.

The plaintiff, who is and at all the times hereinafter mentioned was a citizen of the United States and of the State of California, complains of the defendant, who at all of said times was and is a citizen of the United States and of the State of Montana, and alleges that the above entitled cause is a suit of a civil nature wherein the matter or amount in controversy or dispute exceeds, exclusive of interest and costs, the sum

or value of three thousand dollars (\$3,000.00); and the said plaintiff further complains and alleges:

II.

1. That she, plaintiff, is the sister of Mary M. Smith; that at the several times hereinafter mentioned the said Mary M. Smith was and is now the owner of those certain lots, pieces or parcels of land situated in the City of Lewistown, County of Fergus, State of Montana, designated and described as Lots numbered three (3) and four (4) in Block lettered "O" in Seventeen (17) of the Original Townsite of Lewistown, Fergus County, Montana, together with the buildings and structures thereon situated known as the Hoffman House.

2. That on, to-wit, the 14th day of March, 1910, the said Mary M. Smith conveyed said land and premises, by deed, to the defendant, Sadie Hoffman, a copy of which deed is hereto attached marked Exhibit "A," and of this complaint made a part, and that contemporaneously with the said deed and conveyance and as a part of the same transaction, and for the purpose of showing and evidencing the nature and intent with which said deed and conveyance was executed, the said Mary M. Smith and the said Sadie Hoffman, the defendant herein, made and executed a certain agreement and contract in writing, which is in the words and figures following, to-wit:

"A written contract between two parties, Mary Smith, party of the first part, and Sadie Hoffman, party of the second part, concerning the deed to Hoffman House, that no less than \$50 per mo.

be paid to Mrs. J. A. McNaught for an unlimited time and the deed then will stand good until the marriage or death of the party of the second part, Sadie Hoffman, when it goes back to party of the first part, Mary Smith, if alive, if not to her heirs.

“Signed and sealed:

Mary M. Smith
Sadie Hoffman.”

and the plaintiff does allege that the deed therein referred to does and was intended to refer to the deed, Exhibit “A” hereof, and the “Hoffman House” therein referred to does and was intended to refer to the premises set out and described in subdivision 1 of this cause of action, and the name therein contained, to-wit, Mrs. J. A. McNaught, does and was intended to refer to the plaintiff herein; and plaintiff does aver and allege that no other or further consideration for such deed passed or was given by the said defendant than the carrying out and fulfillment of the conditions of such agreement or contract.

3. Plaintiff does further aver and allege that thereupon said papers, respectively, were delivered and the defendant in pursuance thereof entered into the possession and enjoyment of said premises, and since then has continued and is now in such enjoyment and possession.

4. That defendant, in pursuance of the aforesaid transaction, paid to the plaintiff the sum of Fifty dollars (\$50.00) a month down to, to-wit, the 14th day of October, 1910, but since then she has wholly failed, neglected and refused to pay the plaintiff any further

sums of money whatsoever, although often thereunto requested.

5. That prior to the commencement of this action a demand was made upon the said defendant to comply with her said agreement and to pay to the plaintiff the sums of money coming and due to her by reason of said contract and agreement, but defendant has refused and neglected to comply with said demand and does continue such refusal and neglect.

WHEREFORE, plaintiff prays judgment against the defendant for the sum of Six hundred dollars (\$600.00) together with interest thereon at the rate of eight per cent per annum from the 14th day of October, 1911, and for costs of suit.

II.

And for a further and second cause of action against the defendant the plaintiff complains and alleges:

1. That she, plaintiff, is the sister of Mary M. Smith; that at the several times hereinafter mentioned the said Mary M. Smith was and is now the owner of those certain lots, pieces or parcels of land situated in the City of Lewistown, County of Fergus, State of Montana, designated and described as Lots numbered three (3) and four (4) in Block lettered "O" in Seventeen (17) of the Original Townsite of Lewistown, Fergus County, Montana, together with the buildings and structures thereon situated known as the Hoffman House.

2. That on, to-wit, the 14th day of March, 1910, the said Mary M. Smith conveyed said land and premises, by deed, to the defendant, Sadie Hoffman, a

copy of which deed is hereto attached marked Exhibit "A," and of this complaint made a part, and that contemporaneously with the said deed and conveyance and as a part of the same transaction, and for the purpose of showing and evidencing the nature and intent with which said deed and conveyance was executed, the said Mary M. Smith and the said Sadie Hoffman, the defendant herein, made and executed a certain agreement and contract in writing, which is in the words and figures following, to-wit:

"A written contract between two parties, Mary Smith, party of the first part, and Sadie Hoffman, party of the second part, concerning the deed to Hoffman House, that no less than \$50 per mo. be paid to Mrs. J. A. McNaught for an unlimited time and the deed then will stand good until the marriage or death of the party of the second part, Sadie Hoffman, when it goes back to party of the first part, Mary Smith, if alive, if not to her heirs.

"Signed and sealed:

Mary M. Smith

Sadie Hoffman."

and the plaintiff does allege that the deed therein referred to does and was intended to refer to the deed, Exhibit "A" hereof, and the "Hoffman House" therein referred to does and was intended to refer to the premises set out and described in subdivision 1 of this cause of action, and the name therein contained, to-wit, Mrs. J. A. McNaught, does and was intended to refer to the plaintiff herein; and plaintiff does aver and

allege that no other or further consideration for such deed passed or was given by the said defendant than the carrying out and fulfillment of the conditions of such agreement or contract.

3. Plaintiff does further aver and allege that thereupon said papers, respectively, were delivered and the defendant in pursuance thereof entered into the possession and enjoyment of said premises, and since then has continued and is now in such enjoyment and possession.

4. That defendant, in pursuance of the aforesaid transaction, paid to the plaintiff the sum of Fifty dollars (\$50.00) a month down to, to-wit, the 14th day of October, 1910, but since then she has wholly failed, neglected and refused to pay the plaintiff any further sums of money whatsoever, although often thereunto requested.

5. That prior to the commencement of this action a demand was made upon the said defendant to comply with her said agreement and to pay to the plaintiff the sums of money coming and due to her by reason of said contract and agreement, but defendant has refused and neglected to comply with said demand and does continue such refusal and neglect.

WHEREFORE, plaintiff prays judgment against the defendant for the sum of Six hundred dollars (\$600.00) together with interest thereon at the rate of eight per cent per annum from the 14th day of October, 1912, and for costs of suit.

III.

And for a further and third cause of action against

the defendant the plaintiff complains and alleges:

1. That she, plaintiff, is the sister of Mary M. Smith; that at the several times hereinafter mentioned the said Mary M. Smith was and is now the owner of those certain lots, pieces or parcels of land situated in the City of Lewistown, County of Fergus, State of Montana, designated and described as Lots numbered (3) and four (4) in Block lettered "O" in Seventeen (17) of the Original Townsite of Lewistown, Fergus County, Montana, together with the buildings and structures thereon situated known as the Hoffman House.

2. That on, to-wit, the 14th day of March, 1910, the said Mary M. Smith conveyed said land and premises, by deed, to the defendant, Sadie Hoffman, a copy of which deed is hereto attached marked Exhibit "A," and of this complaint made a part, and that contemporaneously with the said deed and conveyance and as a part of the same transaction, and for the purpose of showing and evidencing the nature and intent with which said deed and conveyance was executed, the said Mary M. Smith and the said Sadie Hoffman, the defendant herein, made and executed a certain agreement and contract in writing, which is in the words and figures following, to-wit:

"A written contract between two parties, Mary Smith, party of the first part, and Sadie Hoffman, party of the second part, concerning the deed to Hoffman House, that no less than \$50 per mo. be paid to Mrs. J. A. McNaught for an unlimited time and the deed then will stand good

until the marriage or death of the party of the second part, Sadie Hoffman, when it goes back to party of the first part, Mary Smith, if alive, if not to her heirs.

“Signed and sealed:

Mary M. Smith
Sadie Hoffman.”

and the plaintiff does allege that the deed therein referred to does and was intended to refer to the deed, Exhibit “A” hereof, and the “Hoffman House” therein referred to does and was intended to refer to the premises set out and described in subdivision 1 of this cause of action, and the name therein contained, to-wit, Mrs. J. A. McNaught, does and was intended to refer to the plaintiff herein; and plaintiff does aver and allege that no other or further consideration for such deed passed or was given by the said defendant than the carrying out and fulfillment of the conditions of such agreement or contract.

3. Plaintiff does further aver and allege that there-upon said papers, respectively, were delivered and the defendant in pursuance thereof entered into the possession and enjoyment of said premises, and since then has continued and is now in such enjoyment and possession.

4. That defendant, in pursuance of the aforesaid transaction, paid to the plaintiff the sum of Fifty (\$50.00) dollars a month down to, to-wit, the 14th day of October, 1910, but since then she has wholly failed, neglected and refused to pay the plaintiff any further sums of money whatsoever, although often

thereunto requested.

5. That prior to the commencement of this action a demand was made upon the said defendant to comply with her said agreement and to pay to the plaintiff the sums of money coming and due to her by reason of said contract and agreement, but defendant has refused and neglected to comply with said demand and does continue such refusal and neglect.

WHEREFORE, plaintiff prays judgment against the defendant for the sum of Six hundred dollars (\$600.00) together with interest thereon at the rate of eight per cent per annum from the 14th day of October, 1913, and for costs of suit.

IV.

And for a further and fourth cause of action against the defendant the plaintiff complains and alleges:

1. That she, plaintiff, is the sister of Mary M. Smith; that at the several times hereinafter mentioned the said Mary M. Smith was and is now the owner of those certain lots, pieces or parcels of land situated in the City of Lewistown, County of Fergus, State of Montana, designated and described as Lots numbered three (3) and four (4) in Block letter "O" in Seventeen (17) of the Original Townsite of Lewistown, Fergus County, Montana, together with the buildings and structures thereon situated known as the Hoffman House.

2. That on, to-wit, the 14th day of March, 1910, the said Mary M. Smith conveyed said land and premises, by deed, to the defendant, Sadie Hoffman, a copy of which deed is hereto attached marked Ex-

hibit "A," and of this complaint made a part, and that contemporaneously with the said deed and conveyance and as a part of the same transaction, and for the purpose of showing and evidencing the nature and intent with which said deed and conveyance was executed, the said Mary M. Smith and the said Sadie Hoffman, the defendant herein, made and executed a certain agreement and contract in writing, which is in the words and figures following, to-wit:

"A written contract between two parties, Mary Smith, party of the first part, and Sadie Hoffman, party of the second part, concerning the deed to Hoffman House, that no less than \$50 per mo. be paid to Mrs. J. A. McNaught for an unlimited time and the deed then will stand good until the marriage or death of the party of the second part, Sadie Hoffman, when it goes back to party of the first part, Mary Smith, if alive, if not to her heirs.

"Signed and sealed:

Mary M. Smith

Sadie Hoffman."

and the plaintiff does allege that the deed therein referred to does and was intended to refer to the deed, Exhibit "A" hereof, and the "Hoffman House" therein referred to does and was intended to refer to the premises set out and described in subdivision 1 of this cause of action, and the name therein contained, to-wit, Mrs. J. A. McNaught, does and was intended to refer to the plaintiff herein; and plaintiff does aver and allege that no other or further consideration for such deed passed or was given by the said defendant than

the carrying out and fulfillment of the conditions of such agreement or contract.

3. Plaintiff does further aver and allege that thereupon said papers, respectively, were delivered and the defendant in pursuance thereof entered into the possession and enjoyment of said premises, and since then has continued and is now in such enjoyment and possession.

4. That defendant, in pursuance of the aforesaid transaction, paid to the plaintiff the sum of Fifty dollars (\$50.00) a month down to, to-wit, the 14th day of October, 1910, but since then she has wholly failed, neglected and refused to pay the plaintiff any further sums of money whatsoever, although often thereunto requested.

5. That prior to the commencement of this action a demand was made upon the said defendant to comply with her said agreement and to pay to the plaintiff the sums of money coming and due to her by reason of said contract and agreement, but defendant has refused and neglected to comply with said demand and does continue such refusal and neglect.

WHEREFORE, plaintiff prays judgment against the defendant for the sum of Six Hundred dollars (\$600.00) together with interest thereon at the rate of eight per cent per annum from the 14th day of October, 1914, and for costs of suit.

V.

And for a further and fifth cause of action against the defendant the plaintiff complains and alleges:

1. That she, plaintiff, is the sister of Mary M.

Smith; that at the several times hereinafter mentioned the said Mary M. Smith was and is now the owner of those certain lots, pieces or parcels of land situated in the City of Lewistown, County of Fergus, State of Montana, designated and described as Lots numbered three (3) and four (4) in Block lettered "O" in Seventeen (17) of the Original Townsite of Lewistown, Fergus County, Montana, together with the buildings and structures thereon situated known as the Hoffman House.

2. That on, to-wit, the 14th day of March, 1910, the said Mary M. Smith conveyed said land and premises, by deed, to the defendant, Sadie Hoffman, a copy of which deed is hereto attached marked Exhibit "A," and of this complaint made a part, and that contemporaneously with the said deed and conveyance and as a part of the same transaction, and for the purpose of showing and evidencing the nature and intent with which said deed and conveyance was executed, the said Mary M. Smith and the said Sadie Hoffman, the defendant herein, made and executed a certain agreement and contract in writing, which is in the words and figures following, to-wit:

"A written contract between two parties, Mary Smith, party of the first part, and Sadie Hoffman, party of the second part, concerning the deed to Hoffman House, that no less than \$50 per mo. be paid to Mrs. J. A. McNaught for an unlimited time and the deed then will stand good until the marriage or death of the party of the second part, Sadie Hoffman, when it goes back to party of the

first part, Mary Smith, if alive, if not to her heirs.

“Signed and sealed:

Mary M. Smith

Sadie Hoffman.”

and the plaintiff does allege that the deed therein referred to does and was intended to refer to the deed, Exhibit “A” hereof, and the “Hoffman House” therein referred to does and was intended to refer to the premises set out and described in subdivision 1 of this cause of action, and the name therein contained, to-wit, Mrs. J. A. McNaught, does and was intended to refer to the plaintiff herein; and plaintiff does aver and allege that no other or further consideration for such deed passed or was given by the said defendant than the carrying out and fulfillment of the conditions of such agreement or contract.

3. Plaintiff does further aver and allege that thereupon said papers, respectively, were delivered and the defendant in pursuance thereof entered into the possession and enjoyment of said premises, and since then has continued and is now in such enjoyment and possession.

4. That defendant, in pursuance of the aforesaid transaction, paid to the plaintiff the sum of Fifty dollars (\$50.00) a month down to, to-wit, the 14th day of October, 1910, but since then she has wholly failed, neglected and refused to pay the plaintiff any further sums of money whatsoever, although often thereunto requested.

5. That prior to the commencement of this action a demand was made upon the said defendant to com-

ply with her said agreement and to pay to the plaintiff the sums of money coming and due to her by reason of said contract and agreement, but defendant has refused and neglected to comply with said demand and does continue such refusal and neglect.

WHEREFORE, plaintiff prays judgment against the defendant for the sum of Six Hundred dollars (\$600.00), together with interest thereon at the rate of eight per cent per annum from the 14th day of October, 1915, and for costs of suit.

VI.

And for a further and sixth cause of action against the defendant the plaintiff complains and alleges:

1. That she, plaintiff, is the sister of Mary M. Smith; that at the several times hereinafter mentioned the said Mary M. Smith was and is now the owner of those certain lots, pieces or parcels of land situated in the City of Lewistown, County of Fergus, State of Montana, designated and described as Lots numbered three (3) and four (4) in Block lettered "O" in Seventeen (17) of the Original Townsite of Lewistown, Fergus County, Montana, together with the buildings and structures thereon situated known as the Hoffman House.

2. That on, to-wit, the 14th day of March, 1910, the said Mary M. Smith conveyed said land and premises, by deed, to the defendant, Sadie Hoffman, a copy of which deed is hereto attached marked Exhibit "A," and of this complaint made a part, and that contemporaneously with the said deed and conveyance and as a part of the same transaction, and for

the purpose of showing and evidencing the nature and intent with which said deed and conveyance was executed, the said Mary M. Smith and the said Sadie Hoffman, the defendant herein, made and executed a certain agreement and contract in writing, which is in the words and figures following, to-wit:

“A written contract between two parties, Mary Smith, party of the first part, and Sadie Hoffman, party of the second part, concerning the deed to Hoffman House, that no less than \$50 per mo. be paid to Mrs. J. A. McNaught for an unlimited time and the deed then will stand good until the marriage or death of the party of the second part, Sadie Hoffman, when it goes back to party of the first part, Mary Smith, if alive, if not to her heirs.

“Signed and sealed:

Mary M. Smith
Sadie Hoffman.”

and the plaintiff does allege that the deed therein referred to does and was intended to refer to the deed, Exhibit “A” hereof, and the “Hoffman House” therein referred to does and was intended to refer to the premises set out and described in subdivision 1 of this cause of action, and the name therein contained, to-wit, Mrs. J. A. McNaught, does and was intended to refer to the plaintiff herein; and plaintiff does aver and allege that no other or further consideration for such deed passed or was given by the said defendant than the carrying out and fulfillment of the conditions of such agreement or contract.

3. Plaintiff does further aver and allege that thereupon said papers, respectively, were delivered and the defendant in pursuance thereof entered into the possession and enjoyment of said premises, and since then has continued and is now in such enjoyment and possession.

4. That defendant, in pursuance of the aforesaid transaction, paid to the plaintiff the sum of Fifty Dollars (\$50.00) a month down to, to-wit, the 14th day of October, 1910, but since then she has wholly failed, neglected and refused to pay the plaintiff any further sums of money whatsoever, although often thereunto requested.

5. That prior to the commencement of this action a demand was made upon the said defendant to comply with her said agreement and to pay to the plaintiff the sums of money coming and due to her by reason of said contract and agreement, but defendant has refused and neglected to comply with said demand and does continue such refusal and neglect.

WHEREFORE, plaintiff prays judgment against the defendant for the sum of Six Hundred dollars (\$600.00), together with interest thereon at the rate of eight per cent per annum from the 14th day of October, 1916, and for costs of suit.

VII.

And for a further and seventh cause of action against the defendant the plaintiff complains and alleges:

1. That she, plaintiff, is the sister of Mary M. Smith; that at the several times hereinafter mentioned

the said Mary M. Smith was and is now the owner of those certain lots, pieces or parcels of land situated in the City of Lewistown, County of Fergus, State of Montana, designated and described as Lots numbered three (3) and four (4) in Block lettered "O" in Seventeen (17) of the Original Townsite of Lewistown, Fergus County, Montana, together with the buildings and structures thereon situated known as the Hoffman House.

2. That on, to-wit, the 14th day of March, 1910, the said Mary M. Smith conveyed said land and premises, by deed, to the defendant, Sadie Hoffman, a copy of which deed is hereto attached marked Exhibit "A," and of this complaint made a part, and that contemporaneously with the said deed and conveyance and as a part of the same transaction, and for the purpose of showing and evidencing the nature and intent with which said deed and conveyance was executed, the said Mary M. Smith and the said Sadie Hoffman, the defendant herein, made and executed a certain agreement and contract in writing, which is in the words and figures following, to-wit:

"A written contract between two parties, Mary Smith, party of the first part, and Sadie Hoffman, party of the second part, concerning the deed to Hoffman House, that no less than \$50 per mo. be paid to Mrs. J. A. McNaught for an unlimited time and the deed then will stand good until the marriage or death of the party of the second part, Sadie Hoffman, when it goes back to party of the first part, Mary Smith, if alive, if not to her heirs.

“Signed and sealed:

Mary M. Smith

Sadie Hoffman.”

and the plaintiff does allege that the deed therein referred to does and was intended to refer to the deed, Exhibit “A” hereof, and the “Hoffman House” therein referred to does and was intended to refer to the premises set out and described in subdivision 1 of this cause of action, and the name therein contained, to-wit, Mrs. J. A. McNaught, does and was intended to refer to the plaintiff herein; and plaintiff does aver and allege that no other or further consideration for such deed passed or was given by the said defendant than the carrying out and fulfillment of the conditions of such agreement or contract.

3. Plaintiff does further aver and allege that thereupon said papers, respectively, were delivered and the defendant in pursuance thereof entered into the possession and enjoyment of said premises, and since then has continued and is now in such enjoyment and possession.

4. That defendant, in pursuance of the aforesaid transaction, paid to the plaintiff the sum of Fifty Dollars (\$50.00) a month down to, to-wit, the 14th day of October, 1910, but since then she has wholly failed, neglected and refused to pay the plaintiff any further sums of money whatsoever, although often thereunto requested.

5. That prior to the commencement of this action a demand was made upon the said defendant to comply with her said agreement and to pay to the plaintiff

the sums of money coming and due to her by reason of said contract and agreement, but defendant has refused and neglected to comply with said demand and does continue such refusal and neglect.

WHEREFORE, plaintiff prays judgment against the defendant for the sum of Six Hundred Dollars (\$600.00), together with interest thereon at the rate of eight per cent per annum from the 14th day of October, 1917, and for costs of suit.

VIII.

And for a further and eighth cause of action against the defendant the plaintiff complains and alleges:

1. That she, plaintiff, is the sister of Mary M. Smith; that at the several times hereinafter mentioned the said Mary M. Smith was and ~~is~~^{is} now the owner of those certain lots, pieces or parcels of land situated in the City of Lewistown, County of Fergus, State of Montana, designated and described as Lots numbered three (3) and four (4) in Block lettered "O" in Seventeen (17) of the Original Townsite of Lewistown, Fergus County, Montana, together with the buildings and structures thereon situated known as the Hoffman House.

2. That on, to-wit, the 14th day of March, 1910, the said Mary M. Smith conveyed said land and premises, by deed, to the defendant, Sadie Hoffman, a copy of which deed is hereto attached marked Exhibit "A," and of this complaint made a part, and that contemporaneously with the said deed and conveyance and as a part of the same transaction, and for the purpose of showing and evidencing the nature

and intent with which said deed and conveyance was executed, the said Mary M. Smith and the said Sadie Hoffman, the defendant herein, made and executed a certain agreement and contract in writing, which is in the words and figures following, to-wit:

“A written contract between two parties, Mary Smith, party of the first part, and Sadie Hoffman, party of the second part, concerning the deed to Hoffman House, that no less than \$50 per mo. be paid to Mrs. J. A. McNaught for an unlimited time and the deed then will stand good until the marriage or death of the party of the second part, Sadie Hoffman, when it goes back to party of the first part, Mary Smith, if alive, if not to her heirs.

“Signed and sealed:

Mary M. Smith
Sadie Hoffman.”

and the plaintiff does allege that the deed therein referred to does and was intended to refer to the deed, Exhibit “A” hereof, and the “Hoffman House” therein referred to does and was intended to refer to the premises set out and described in subdivision 1 of this cause of action, and the name therein contained, to-wit, Mrs. J. A. McNaught, does and was intended to refer to the plaintiff herein; and plaintiff does aver and allege that no other or further consideration for such deed passed or was given by the said defendant than the carrying out and fulfillment of the conditions of such agreement or contract.

3. Plaintiff does further aver and allege that there-

upon said papers, respectively, were delivered and the defendant in pursuance thereof entered into the possession and enjoyment of said premises, and since then has continued and is now in such enjoyment and possession.

4. That defendant, in pursuance of the aforesaid transaction, paid to the plaintiff the sum of Fifty Dollars (\$50.00) a month down to, to-wit, the 14th day of October, 1910, but since then she has wholly failed, neglected and refused to pay the plaintiff any further sums of money whatsoever, although often thereunto requested.

5. That prior to the commencement of this action a demand was made upon the said defendant to comply with her said agreement and to pay to the plaintiff the sums of money coming and due to her by reason of said contract and agreement, but defendant has refused and neglected to comply with said demand and does continue such refusal and neglect.

WHEREFORE, plaintiff prays judgment against the defendant for the sum of Six Hundred Dollars (\$600.00), together with interest thereon at the rate of eight per cent per annum from the 14th day of October, 1918, and for costs of suit.

IX.

And for a further and ninth cause of action against the defendant the plaintiff complains and alleges:

1. That she, plaintiff, is the sister of Mary M. Smith; that at the several times hereinafter mentioned the said Mary M. Smith was and is now the owner of those certain lots, pieces or parcels of land situated

in the City of Lewistown, County of Fergus, State of Montana, designated and described as Lots numbered three (3) and four (4) in Block lettered "O" in Seventeen (17) of the Original Townsite of Lewistown, Fergus County, Montana, together with the buildings and structures thereon situated known as the Hoffman House.

2. That on, to-wit, the 14th day of March, 1910, the said Mary M. Smith conveyed said land and premises, by deed, to the defendant, Sadie Hoffman, a copy of which deed is hereto attached marked Exhibit "A," and of this complaint made a part, and that contemporaneously with the said deed and conveyance and as a part of the same transaction, and for the purpose of showing and evidencing the nature and intent with which said deed and conveyance was executed, the said Mary M. Smith and the said Sadie Hoffman, the defendant herein, made and executed a certain agreement and contract in writing, which is in the words and figures following, to-wit:

"A written contract between two parties, Mary Smith, party of the first part, and Sadie Hoffman, party of the second part, concerning the deed to Hoffman House, that no less than \$50 per mo. be paid to Mrs. J. A. McNaught for an unlimited time and the deed then will stand good until the marriage or death of the party of the second part, Sadie Hoffman, when it goes back to party of the first part, Mary Smith, if alive, if not to her heirs.

"Signed and sealed:

Mary M. Smith
Sadie Hoffman."

and the plaintiff does allege that the deed therein referred to does and was intended to refer to the deed, Exhibit "A" hereof, and the "Hoffman House" therein referred to does and was intended to refer to the premises set out and described in subdivision 1 of this cause of action, and the name therein contained, to-wit, Mrs. J. A. McNaught, does and was intended to refer to the plaintiff herein; and plaintiff does aver and allege that no other or further consideration for such deed passed or was given by the said defendant than the carrying out and fulfillment of the conditions of such agreement or contract.

3. Plaintiff does further aver and allege that thereupon said papers, respectively, were delivered and the defendant in pursuance thereof entered into the possession and enjoyment of said premises, and since then has continued and is now in such enjoyment and possession.

4. That defendant, in pursuance of the aforesaid transaction, paid to the plaintiff the sum of Fifty Dollars (\$50.00) a month down to, to-wit, the 14th day of October, 1910, but since then she has wholly failed, neglected and refused to pay the plaintiff any further sums of money whatsoever, although often thereunto requested.

5. That prior to the commencement of this action a demand was made upon the said defendant to comply with her said agreement and to pay to the plaintiff the sums of money coming and due to her by reason of said contract and agreement, but defendant has refused and neglected to comply with said demand

and does continue such refusal and neglect.

WHEREFORE, plaintiff prays judgment against the defendant for the sum of Six Hundred Dollars (\$600.00), together with interest thereon at the rate of eight per cent per annum from the 14th day of October, 1919, and for costs of suit.

X.

And for a further and tenth cause of action against the defendant the plaintiff complains and alleges:

1. That she, plaintiff, is the sister of Mary M. Smith; that at the several times hereinafter mentioned the said Mary M. Smith was and is now the owner of those certain lots, pieces or parcels of land situated in the City of Lewistown, County of Fergus, State of Montana, designated and described as Lots numbered three (3) and four (4) in Block lettered "O" in Seventeen (17) of the Original Townsite of Lewistown, Fergus County, Montana, together with the buildings and structures thereon situated known as the Hoffman House.

2. That on, to-wit, the 14th day of March, 1910, the said Mary M. Smith conveyed said land and premises, by deed, to the defendant, Sadie Hoffman, a copy of which deed is hereto attached marked Exhibit "A," and of this complaint made a part, and that contemporaneously with the said deed and conveyance and as a part of the same transaction, and for the purpose of showing and evidencing the nature and intent with which said deed and conveyance was executed, the said Mary M. Smith and the said Sadie Hoffman, the defendant herein, made and executed

a certain agreement and contract in writing, which is in the words and figures following, to-wit.

“A written contract between two parties, Mary Smith, party of the first part, and Sadie Hoffman, party of the second part, concerning the deed to Hoffman House, that no less than \$50 per mo. be paid to Mrs. J. A. McNaught for an unlimited time and the deed then will stand good until the marriage or death of the party of the second part, Sadie Hoffman, when it goes back to party of the first part, Mary Smith, if alive, if not to her heirs.

“Signed and sealed:

Mary M. Smith

Sadie Hoffman.”

and the plaintiff does allege that the deed therein referred to does and was intended to refer to the deed, Exhibit “A” hereof, and the “Hoffman House” therein referred to does and was intended to refer to the premises set out and described in subdivision 1 of this cause of action, and the name therein contained, to-wit, Mrs. J. A. McNaught, does and was intended to refer to the plaintiff herein; and plaintiff does aver and allege that no other or further consideration for such deed passed or was given by the said defendant than the carrying out and fulfillment of the conditions of such agreement or contract.

3. Plaintiff does further aver and allege that thereupon said papers, respectively, were delivered and the defendant in pursuance thereof entered into the possession and enjoyment of said premises, and since

then has continued and is now in such enjoyment and possession.

4. That defendant, in pursuance of the aforesaid transaction, paid to the plaintiff the sum of Fifty Dollars (\$50.00) a month down to, to-wit, the 14th day of October, 1910, but since then she has wholly failed, neglected and refused to pay the plaintiff any further sums of money whatsoever, although often thereunto requested.

5. That prior to the commencement of this action a demand was made upon the said defendant to comply with her said agreement and to pay to the plaintiff the sums of money coming and due to her by reason of said contract and agreement, but defendant has refused and neglected to comply with said demand and does continue such refusal and neglect.

WHEREFORE, plaintiff prays judgment against the defendant for the sum of Fifty Dollars (\$50.00) a month for each and every month from and after the 14th day of October, 1919.

WHEREFORE, plaintiff prays judgment against the defendant: (1) For the sum of Six hundred dollars (\$600.00) with interest thereon at the rate of eight per cent per annum from the 14th day of October, 1911;

2. For the sum of Six Hundred dollars (\$600.00) with interest thereon at the rate of eight per cent per annum from the 14th day of October, 1912;

3. For the sum of Six Hundred dollars (\$600.00) with interest thereon at the rate of eight per cent per annum from the 14th day of October, 1913;

4. For the sum of Six Hundred Dollars (\$600.00) with interest thereon at the rate of eight per cent per annum from the 14th day of October, 1914;

5. For the sum of Six Hundred Dollars (\$600.00) with interest thereon at the rate of eight per cent per annum from the 14th day of October, 1915;

6. For the sum of Six Hundred Dollars (\$600.00) with interest thereon at the rate of eight per cent per annum from the 14th day of October, 1916;

7. For the sum of Six Hundred Dollars (\$600.00) with interest thereon at the rate of eight per cent per annum from the 14th day of October, 1917;

8. For the sum of Six Hundred Dollars (\$600.00) with interest thereon at the rate of eight per cent per annum from the 14th day of October, 1918;

9. For the sum of Six Hundred Dollars (\$600.00) with interest thereon at the rate of eight per cent per annum from the 14th day of October, 1919;

10. For the sum of Fifty Dollars (\$50.00) a month for each and every month after October 14, 1919;

And for costs of suit.

McINTIRE & MURPHY,

Plaintiff's Attorneys.

State of Montana,

County of Lewis and Clark,—ss.

HOMER G. MURPHY, being first duly sworn, deposes and says. That he is one of the attorneys for the plaintiff named in the foregoing complaint and as such makes this verification for and on behalf of the said plaintiff for the reason that said plaintiff is not

now within the County of Lewis and Clark, which is the County wherein affiant resides; that he has read the foregoing complaint and knows the contents thereof and that the matters and things therein alleged are true to the best of his knowledge, information and belief.

Homer G. Murphy.

Subscribed and sworn to before me this 25th day of June, 1920.

Clara E. Bower.

EXHIBIT "A."

THIS INDENTURE, made the 16th day of February, in the year of our Lord one thousand nine hundred and ten (1910) between Mary M. Smith, a widow in her own right of property, of Pasadena, California, and Smith Brothers Sheep Co. of Martinsdale, Montana, Mary M. Smith, proprietor and owner, the parties of the first part, and Sadie Hoffman, of Lewistown, Fergus County, Montana, the party of the second part.

WITNESSETH: That the said party of the first part, for and in consideration of the sum of one dollar and other valuable considerations, lawful money of the United States of America to her in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell, convey and confirm unto the said party of the second part, and to her heirs and assigns forever, all the real property situated in Fergus County, State of Montana, described as follows: Lots numbered three (3) and four (4) in Block lettered "O"

Seal

NOT A VALID INSTRUMENT IN THE STATE OF MONTANA
Recording at Helena
My Commission expires

in number seventeen of the original Townsite of Lewistown, Fergus County, Montana, as is shown by a plat thereof on file and of record in the office of the county clerk and recorder of Fergus County, Montana.

Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining; and the reversion and reversions, remainder or remainders, rents, issues and profits thereof, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or to the said premises, and every part or parcel thereof, with the appurtenances.

TO HAVE AND TO HOLD, all and singular the above mentioned and described premises, together with the appurtenances unto the said party of the second part, and to her heirs and assigns forever. And the said party of the first part, and heirs does hereby covenant that she will forever warrant and defend all right, title and interest in and to the said premises, and the quiet and peaceable possession thereof, unto the said party of the second part, and all and every person and persons whomsoever, lawfully claiming or to claim the same.

IN WITNESS WHEREOF, the said party of the first part, has hereunto set her hand and seal the day and year first above written.

Signed, sealed and delivered in the presence of:

SMITH BROS. SHEEP CO. (SEAL)

MARY M. SMITH (SEAL)

By Mary M. Smith, Proprietor and Owner.

State of California,
County of Los Angeles,—ss.

On this fourteenth day of March, in the year one thousand nine hundred and ten, before me, H. I. Chatfield, a Notary Public in and for the county and state aforesaid, personally appeared Mary M. Smith, a widow, in her own right of property, of Pasadena, California, and Mary M. Smith, proprietor and owner of Smith Brothers Sheep Co., of Martinsdale, Montana, the party of the first part, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that she executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal the day and year first above written.

(SEAL)

H. I. CHATFIELD.

Notary Public in and for Los Angeles County, State of California.

Endorsed: "Filed for record this 21st day of March, A. D. 1910, at 9:50 o'clock a. m. in book 35, page 429, deed records of Fergus County, Montana.

C. L. MYERSICK, Register of Deeds.

By G. M. DEATON, Deputy."

Filed: June 25, 1920.

C. R. Garlow, Clerk.

Thereafter on June 25, 1920, summons was duly issued in said cause out of said court in words and figures following, to-wit:

UNITED STATES OF AMERICA
DISTRICT COURT OF THE UNITED STATES
DISTRICT OF MONTANA

OLLIE N. McNAUGHT,

Plaintiff,

vs.

SADIE HOFFMAN,

Defendant.

Action brought in the said District Court, and the Complaint filed in the office of the Clerk of said District Court, in the City of Helena, County of Lewis and Clark.

The President of the United States of America, Greeting:

TO THE ABOVE NAMED DEFENDANT.....

Sadie Hoffman.

You are hereby summoned to answer the complaint in this action which is filed in the office of the Clerk of this Court, a copy of which is herewith served upon you, and to file your answer and serve a copy thereof upon the Plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case your failure to appear or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

WITNESS: the Honorable GEORGE M. BOURQUIN, Judge of the United States District Court, District of Montana, this 25th day of June, in the year of our Lord one thousand nine hundred and

twenty, and of our Independence the 144.

(Court Seal)

C. R. GARLOW,

Clerk.

H. H. WALKER,

Deputy Clerk.

UNITED STATES MARSHAL'S OFFICE,

District of Montana,

I HEREBY CERTIFY, that I received the within summons on the 26th day of June, 1920, and personally served the same on the 26th day of June, 1920, on defendant, Sadie Hoffman, by delivery to, and leaving with said defendant named therein personally, at Lewistown, County of Fergus, in said District, a certified copy thereof, together with a copy of the Complaint, certified to by clerk of said court attached thereto.

Dated this 28th day of June, 1920.

JOS. L. ASHBRIDGE,

U. S. Marshal.

By J. W. RICKMAN,

Deputy.

Filed, June 30, 1920.

C. R. GARLOW, Clerk.

Thereafter, on July 16, 1920, demurrer of defendant ~~in error~~ was filed herein in words and figures following, to-wit:

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF MONTANA

OLLIE N. McNAUGHT,

Plaintiff,

vs.

SADIE HOFFMAN,

Defendant.

DEMURRER

I.

Comes now the defendant in the above entitled action and demurs to the complaint on file therein, upon the following ground:

1. That said complaint does not state facts sufficient to constitute a cause of action against this defendant.

II.

And demurs to each and every alleged separate cause of action set out in said complaint, upon the ground:

1. That the same does not state facts sufficient to constitute a cause of action against this defendant.

Dated this 15th day of July, 1920.

BELDEN & DeKALB

GUNN, RASCH & HALL,

Attorneys for Defendant.

Due service of within demurrer and receipt of a copy thereof acknowledged this 16th day of July,

1920.

McINTIRE & MURPHY,
Attorneys for Plaintiff.

Filed: July 16, 1920.

C. R. Garlow, Clerk.

Thereafter said demurrer came on to be heard before said court, and the following order was made and entered herein:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA
No. 842. Ollie N. McNaught vs. Sadie Hoffman.

On motion of E. N. Hall, Esq., counsel for defendant, and by consent of Homer G. Murphy, Esq., counsel for plaintiff, court ordered that the demurrer may be withdrawn and defendant granted thirty days to answer.

Entered in open court July 24, 1920.

C. R. Garlow, Clerk.

Thereafter on August 16, 1920, Sadie Hoffman filed her answer herein in words and figures following, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES, DISTRICT OF MONTANA, HELENA DIVISION.

OLLIE N. McNAUGHT,

Plaintiff,

vs.

SADIE HOFFMAN,

Defendant.

ANSWER.

COMES NOW THE DEFENDANT, and for an-

swer to plaintiff's *first* cause of action in plaintiff's complaint on file herein, states and alleges:

I.

ADMITS the affirmative allegations of the first division of plaintiff's complaint.

II.

Defendant admits that plaintiff is a sister of Mary M. Smith, but denies that at the several times in plaintiff's complaint mentioned, or at any other time or at all except as hereinafter specifically set forth, the said Mary M. Smith was the owner of those certain lots, pieces or parcels of land situated in the City of Lewistown, County of Fergus, State of Montana, designated or described as lots numbered Three (3) and Four (4), Block lettered "O" in Seventeen (17) of the Original Townsite of Lewistown, Fergus County, Montana, together with the buildings or structures thereon situated, known as the Hoffman House.

III.

ADMITS that on, to-wit: the 14th day of March, 1910, the said Mary M. Smith conveyed said land and premises by deed to the defendant, Sadie Hoffman, a copy of which deed is attached to plaintiff's complaint, marked Exhibit "A"; but denies that contemporaneously with the said deed or conveyance, or as a part of the same transaction or for the purpose of showing or evidencing the nature and intent with which said deed and conveyance was executed or otherwise or at all except as hereinafter set forth, the said Mary M. Smith, or the said Sadie Hoffman, the defendant herein, made or executed a certain agreement or contract

in writing in the form or language set forth in paragraph 2, division II, of plaintiff's complaint; but alleges the truth and fact to be that the said memorandum was entered into after the making, execution and delivery of the said deed, and the making and signing of the said writing set forth in said paragraph 2 was not made a condition precedent to the delivery of the said deed, and was not, and is not, any consideration whatsoever therefor; but the said writing was entered into at the request of the said Mary M. Smith without any consideration whatsoever therefor. Defendant admits that the deed in said writing referred to, was intended to refer to the deed Exhibit "A" to plaintiff's complaint, and the Hoffman House therein referred to was intended to refer to the premises set out and described in subdivision 1 of plaintiff's *first cause* of action; and admits that the name therein contained, to-wit: Mrs. J. A. McNaught, does and was intended to refer to the plaintiff herein; but denies that no other or further consideration for the said deed passed or was given by the said defendant than the carrying out and fulfillment of the conditions of such agreement or contract. Defendant denies that thereupon said papers, or any of said papers except the said deed, were delivered; and denies that the defendant in pursuance thereof, or except in pursuance of the said deed, entered into the possession or enjoyment of the said premises; but admits that since the execution and delivery of the said deed the defendant has continued, and is now in the enjoyment of the possession of the said premises.

IV.

Denies that the defendant, in pursuance of the aforesaid transaction, or otherwise or at all except in furtherance of the request of the said Mary M. Smith, paid to the plaintiff the sum of Fifty (\$50.00) dollars a month down to, to-wit: the 14th day of October, 1910; but admits that defendant has since the said time, wholly failed to pay the plaintiff any further sums of money whatsoever, and denies that she has often, or otherwise or at all been requested so to do; and defendant further alleges that no moneys whatsoever were paid to plaintiff in pursuance of, or in furtherance of any such contract, as is specified and set forth in plaintiff's complaint herein; but that the said paper writing set forth in subdivision II of plaintiff's first cause of action, was executed by the said Mary M. Smith and the said Sadie Hoffman with the distinct understanding that the terms and phrase "unlimited time thereon" was to be taken and understood by the said Mary M. Smith and the said Sadie Hoffman to mean and be construed as such time as might be necessary for the said Mary M. Smith to make arrangements from some other source to care for and provide for the said plaintiff; and the same was executed and delivered with that interpretation and that understanding being placed upon the said instrument and had by the said parties thereto; and that on or about the 9th day of October, 1910, the said Mary M. Smith notified and informed the defendant of and concerning the said writing so set forth in subdivision II of plaintiff's first cause of action herein:

in writing in the form or language set forth in paragraph 2, division II, of plaintiff's complaint; but alleges the truth and fact to be that the said memorandum was entered into after the making, execution and delivery of the said deed, and the making and signing of the said writing set forth in said paragraph 2 was not made a condition precedent to the delivery of the said deed, and was not, and is not, any consideration whatsoever therefor; but the said writing was entered into at the request of the said Mary M. Smith without any consideration whatsoever therefor. Defendant admits that the deed in said writing referred to, was intended to refer to the deed Exhibit "A" to plaintiff's complaint, and the Hoffman House therein referred to was intended to refer to the premises set out and described in subdivision 1 of plaintiff's *first cause* of action; and admits that the name therein contained, to-wit: Mrs. J. A. McNaught, does and was intended to refer to the plaintiff herein; but denies that no other or further consideration for the said deed passed or was given by the said defendant than the carrying out and fulfillment of the conditions of such agreement or contract. Defendant denies that thereupon said papers, or any of said papers except the said deed, were delivered; and denies that the defendant in pursuance thereof, or except in pursuance of the said deed, entered into the possession or enjoyment of the said premises; but admits that since the execution and delivery of the said deed the defendant has continued, and is now in the enjoyment of the possession of the said premises.

IV.

Denies that the defendant, in pursuance of the aforesaid transaction, or otherwise or at all except in furtherance of the request of the said Mary M. Smith, paid to the plaintiff the sum of Fifty (\$50.00) dollars a month down to, to-wit: the 14th day of October, 1910; but admits that defendant has since the said time, wholly failed to pay the plaintiff any further sums of money whatsoever, and denies that she has often, or otherwise or at all been requested so to do; and defendant further alleges that no moneys whatsoever were paid to plaintiff in pursuance of, or in furtherance of any such contract, as is specified and set forth in plaintiff's complaint herein; but that the said paper writing set forth in subdivision II of plaintiff's first cause of action, was executed by the said Mary M. Smith and the said Sadie Hoffman with the distinct understanding that the terms and phrase "unlimited time thereon" was to be taken and understood by the said Mary M. Smith and the said Sadie Hoffman to mean and be construed as such time as might be necessary for the said Mary M. Smith to make arrangements from some other source to care for and provide for the said plaintiff; and the same was executed and delivered with that interpretation and that understanding being placed upon the said instrument and had by the said parties thereto; and that on or about the 9th day of October, 1910, the said Mary M. Smith notified and informed the defendant of and concerning the said writing so set forth in subdivision II of plaintiff's first cause of action herein:

“Dear Sadie: . . . Now a little business, dear. We signed a contract while you were in Calif. When I go back I will burn it up. You can have the Hoffman House, grounds and its furnishings, and when you are through with it, it can go to Mabel, for I feel that you have earned it. It will always give you a support should you lease it, when you get too (lazy) to run it, not (too old), so you need make no other deed. Sincerely,
Mary M. Smith.”

That in accordance with the purpose and intent of the said writing, set forth in subdivision II of plaintiff's first cause of action, the said notice of October 9th, 1910, was intended to and did relieve this defendant of and from any other or further obligation under and by virtue of the said memorandum made the basis of this action.

V.

ADMITS that prior to the commencement of this action a demand was made upon defendant to pay the plaintiff the sums of money claimed to be due to her by reason of the said alleged contract and agreement, and admits that defendant has refused and neglected to comply with the said demand and does continue such refusal and neglect; but denies each and every allegation, matter and thing contained in subdivision V of plaintiff's first cause of action.

VI.

DENIES each and every allegation, matter and thing set forth and contained in plaintiff's *first* cause of ac-

tion herein, not hereby specifically admitted, qualified or denied.

FOR A SEPARATE, SECOND AND FURTHER DEFENSE TO PLAINTIFF'S FIRST CAUSE OF ACTION HEREIN, defendant states and alleges:

I.

That the said alleged cause of action of plaintiff is barred under and by virtue of the provisions of Sections 6443-6445 of the Revised Codes of Montana, which read as follows:

“The periods prescribed for the commencement of action other than for the recovery of real property are as follows: . . . within 8 years: an action upon any contract, obligation or liability founded upon an instrument in writing.”

FOR A SEPARATE, THIRD AND FURTHER DEFENSE to plaintiff's *first* cause of action herein, the defendant states and alleges:

I.

That on the date of the execution of the said writing set forth in paragraph II of said *first* cause of action, the said Mary M. Smith was not indebted to or under any obligation whatsoever to the said plaintiff therein named as Mrs. J. A. McNaught, and there was no consideration whatsoever passed from the said plaintiff to the said Mary M. Smith or to this defendant to support the said instrument; and that after the execution and delivery of the said instrument, to-wit: on or about the 14th day of October, 1910, the same was by the defendant and the said Mary M. Smith, rescinded and annulled and held for naught.

WHEREFORE, defendant prays judgment:

1. That plaintiff's first cause of action be dismissed.

2. For her costs and disbursements herein expended and incurred.

FOR ANSWER TO PLAINTIFF'S SECOND CAUSE OF ACTION, DEFENDANT states and alleges:

I.

Defendant admits that plaintiff is a sister of Mary M. Smith; but denies that at the several times in plaintiff's complaint mentioned, or at any other time or at all except as hereinafter specifically set forth, the said Mary M. Smith was the owner of those certain lots, pieces or parcels of land situated in the City of Lewistown, County of Fergus, State of Montana, designated or described as lots numbered Three (3) and Four (4), Block lettered "O" in Seventeen (17) of the original Townsite of Lewistown, Fergus County, Montana, together with the buildings or structures thereon situated, known as the Hoffman House.

II.

ADMITS that on, to-wit: the 14th day of March, 1910, the said Mary M. Smith conveyed said land and premises by deed to the defendant, Sadie Hoffman, a copy of which deed is attached to plaintiff's complaint, marked Exhibit "A"; but denies that contemporaneously with the said deed or conveyance, or as a part of the same transaction or for the purpose of showing or evidencing the nature and intent with which said deed and conveyance was executed, or otherwise

or at all except as hereinafter set forth, the said Mary M. Smith, or the said Sadie Hoffman, the defendant herein, made or executed a certain agreement or contract in writing in the form or language set forth in paragraph 2 division II of plaintiff's complaint; but alleges the truth and fact to be that the said memorandum was entered into after the making, execution and delivery of the said deed, and the making and signing of the said writing set forth in said paragraph 2 was not made a condition precedent to the delivery of the said deed, and was not, and is not, any consideration whatsoever therefor; but the said writing was entered into at the request of the said Mary M. Smith without any consideration whatsoever therefor. Defendant admits that the deed in said writing referred to, was intended to refer to the deed, Exhibit "A" to plaintiff's complaint, and the Hoffman House therein referred to was intended to refer to the premises set out and described in subdivision 1 of plaintiff's *second cause* of action; and admits that the name therein contained, to-wit: Mrs. J. A. McNaught, does and was intended to refer to the plaintiff herein; but denies that no other or further consideration for the said deed passed or was given by the said defendant than the carrying out and fulfillment of the conditions of such agreement or contract. Defendant denies that thereupon said papers, or any of said papers except the said deed, were delivered; and denies that the defendant in pursuance thereof, or except in pursuance of the said deed, entered into the possession or enjoyment of the said premises; but admits that since the execu-

tion and delivery of the said deed the defendant has continued, and is now in the enjoyment of the possession of the said premises.

III.

DENIES that the defendant, in pursuance of the aforesaid transaction, or otherwise or at all except in furtherance of the request of the said Mary M. Smith, paid to the plaintiff the sum of Fifty (\$50.00) dollars a month down to, to-wit: the 14th day of October, 1910; but admits that defendant has since the said time, wholly failed to pay the plaintiff any further sums of money whatsoever, and denies that she has often, or otherwise or at all been requested so to do; and defendant further alleges that no moneys whatsoever were paid to plaintiff in pursuance of, or in furtherance of any such contract, as is specified and set forth in plaintiff's complaint herein; but that the said paper writing set forth in subdivision II of plaintiff's second cause of action, was executed by the said Mary M. Smith and the said Sadie Hoffman with the distinct understanding that the terms and phrase "unlimited time thereon" was to be taken and understood by the said Mary M. Smith and the said Sadie Hoffman to mean and be construed as such time as might be necessary for the said Mary M. Smith to make arrangements from some other source to care for and provide for the said plaintiff; and the same was executed and delivered with that interpretation and that understanding being placed upon the said instrument and had by the said parties thereto; and that on or about the 9th day of October, 1910, the said Mary

M. Smith notified and informed the defendant of and concerning the said writing so set forth in subdivision II of plaintiff's second cause of action herein:

“Dear Sadie: . . . Now a little business, dear. We signed a contract while you were in Calif. When I go back I will burn it up. You can have the Hoffman House, grounds and its furnishings, and when you are through with it, it can go to Mabel for I feel you have earned it. It will always give you a support should you lease it, when you get too (lazy) to run it, not (too old), so we need make no other deed. Sincerely,

Mary M. Smith.”

That in accordance with the purpose and intent of the said writing set forth in subdivision II of plaintiff's second cause of action, the said notice of October 9th, 1910, was intended to and did relieve this defendant of and from any other^{or} further obligation under and by virtue of the said memorandum made the basis of this action.

IV.

ADMITS that prior to the commencement of this action a demand was made upon defendant to pay the plaintiff the sums of money claimed to be due to her by reason of the said alleged contract and agreement, and admits that defendant has refused and neglected to comply with the said demand and does continue such refusal and neglect; but denies each and every allegation, matter and thing contained in subdivision V of plaintiff's second cause of action.

V.

DENIES each and every allegation, matter and thing set forth and contained in plaintiff's *second* cause of action herein, not hereby specifically admitted, qualified or denied.

FOR A SEPARATE, SECOND AND FURTHER DEFENSE TO PLAINTIFF'S SECOND CAUSE OF ACTION HEREIN, defendant states and alleges:

I.

That the said alleged cause of action of plaintiff is barred under and by virtue of the provisions of Sections 6443-6445 of the Revised Codes of Montana, which read as follows:

“The periods prescribed for the commencement of action other than for the recovery of real property are as follows: . . . within 8 years: an action upon any contract, obligation or liability founded upon an instrument in writing.”

FOR A SEPARATE, THIRD AND FURTHER DEFENSE TO PLAINTIFF'S SECOND CAUSE OF ACTION HEREIN, defendant states and alleges:

I.

That on the date of the execution of the said writing set forth in paragraph II of said *second* cause of action, the said Mary M. Smith was not indebted to or under any obligation whatsoever to the said plaintiff therein named as Mrs. J. A. McNaught, and there was no consideration whatsoever passed from the said plaintiff to the said Mary M. Smith or to this defendant to support the said instrument; and that after the execution and delivery of the said instrument, to-wit:

on or about the 14th day of October, 1910, the same was by the defendant and the said Mary M. Smith, rescinded and annulled and held for naught.

WHEREFORE, defendant prays judgment:

1. That plaintiff's second cause of action be dismissed.

2. For her costs and disbursements herein expended and incurred.

FOR ANSWER TO PLAINTIFF'S THIRD CAUSE OF ACTION, DEFENDANT states and alleges:

I.

Defendant admits that plaintiff is a sister of Mary M. Smith; but denies that at the several times in plaintiff's complaint mentioned, or at any other time or at all except as hereinafter specifically set forth, the said Mary M. Smith was the owner of those certain lots, pieces or parcels of land situated in the City of Lewistown, County of Fergus, State of Montana, designated or described as lots numbered Three (3) and Four (4), Block lettered "O" in Seventeen (17) of the original Townsite of Lewistown, Fergus County, Montana, together with the buildings or structures thereon situated, known as the Hoffman House.

II.

ADMITS that on, to-wit: the 14th day of March, 1910, the said Mary M. Smith conveyed said land and premises by deed to the defendant, Sadie Hoffman, a copy of which deed is attached to plaintiff's complaint, marked Exhibit "A"; but denies that contemporaneously with the said deed or conveyance, or as a part

of the same transaction or for the purpose of showing or evidencing the nature and intent with which said deed and conveyance was executed, or otherwise or at all except as hereinafter set forth, the said Mary M. Smith, or the said Sadie Hoffman, the defendant herein, made or executed a certain agreement or contract in writing in the form or language set forth in paragraph 2 of division II of plaintiff's complaint; but alleges the truth and fact to be that the said memorandum was entered into after the making, execution and delivery of the said deed, and the making and signing of the said writing set forth in said paragraph 2 was not made a condition precedent to the delivery of the said deed, and was not, and is not, any consideration whatsoever therefor; but the said writing was entered into at the request of the said Mary M. Smith without any consideration whatsoever therefor. Defendant admits that the deed in said writing referred to, was intended to refer to the deed Exhibit "A" to plaintiff's complaint, and the Hoffman House therein referred to was intended to refer to the premises set out and described in subdivision I of plaintiff's third cause of action; and admits that the name therein contained, to-wit: Mrs. J. A. McNaught, does and was intended to refer to the plaintiff herein; but denies that no other or further consideration for the said deed passed or was given by the said defendant than the carrying out and fulfillment of the conditions of such agreement or contract. Defendant denies that thereupon said papers or any of said papers except the said deed, were delivered; and denies that the defend-

ant in pursuance thereof, or except in pursuance of the said deed, entered into the possession or enjoyment of the said premises; but admits that since the execution and delivery of the said deed the defendant has continued, and is now in the enjoyment of the possession of the said premises.

III

DENIES that the defendant, in pursuance of the aforesaid transaction, or otherwise or at all except in furtherance of the request of the said Mary M. Smith, paid to the plaintiff the sum of Fifty (\$50.00) Dollars a month down to, to-wit: the 14th day of October, 1910; but admits that defendant has since the said time, wholly failed to pay the plaintiff any further sums of money whatsoever, and denies that she has often, or otherwise or at all been requested so to do; and defendant further alleges that no moneys whatsoever were paid to plaintiff in pursuance of, or in furtherance of any such contract, as is specified and set forth in plaintiff's complaint herein; but that the said paper writing set forth in subdivision II of plaintiff's third cause of action, was executed by the said Mary M. Smith and the said Sadie Hoffman with the distinct understanding that the terms and phrase "unlimited time thereon" was to be taken and understood by the said Mary M. Smith and the said Sadie Hoffman to mean and be construed as such time as might be necessary for the said Mary M. Smith to make arrangements from some other source to care for and provide for the said plaintiff; and the same was executed and delivered with that interpretation and that

understanding being placed upon the said instrument and had by the said parties thereto; and that on or about the 9th day of October, 1910, the said Mary M. Smith notified and informed the defendant of and concerning the said writing so set forth in subdivision II of plaintiff's third cause of action herein:

“Dear Sadie: . . . Now a little business, dear. We signed a contract while you were in Calif. When I go back I will burn it up. You can have the Hoffman House, grounds and its furnishings, and when you are through with it, it can go to Mabel, for I feel you have earned it. It will always give you a support should you lease it, when you get too (lazy) to run it, not (too old), so you need make no other deed. Sincerely,
Mary M. Smith.”

That in accordance with the purpose and intent of the said writing, set forth in subdivision II of plaintiff's third cause of action, the said notice of October 9th, 1910, was intended to and did relieve this defendant of and from any other or further obligation under and by virtue of the said memorandum made the basis of this action.

IV.

ADMITS that prior to the commencement of this action a demand was made upon defendant to pay the plaintiff the sums of money claimed to be due to her by reason of the said alleged contract and agreement, and admits that defendant has refused and neglected to comply with the said demand and does continue such refusal and neglect; but denies each and every

allegation, matter and thing contained in subdivision V of plaintiff's third cause of action.

V.

DENIES each and every allegation, matter and thing set forth and contained in plaintiff's *third* cause of action herein, not hereby specifically admitted, qualified or denied.

FOR A SEPARATE, SECOND AND FURTHER DEFENSE TO PLAINTIFF'S THIRD CAUSE OF ACTION HEREIN, defendant states and alleges:

I.

That the said alleged cause of action of plaintiff is barred under and by virtue of the provisions of Sections 6443-6445 of the Revised Codes of Montana, which read as follows:

"The periods prescribed for the commencement of action other than for the recovery of real property are as follows: . . . within 8 years: an action upon any contract, obligation or liability founded upon an instrument in writing."

FOR A SEPARATE, THIRD AND FURTHER DEFENSE TO PLAINTIFF'S THIRD CAUSE OF ACTION HEREIN, the defendant states and alleges:

I.

That on the date of the execution of the said writing set forth in paragraph II of said *third* cause of action, the said Mary M. Smith was not indebted to or under any obligation whatsoever to the said plaintiff therein named as Mrs. J. A. McNaught, and there was no consideration whatsoever passed from the said plaintiff to the said Mary M. Smith or to this defendant

to support the said instrument; and that after the execution and delivery of the said instrument, to-wit: on or about the 14th day of October, 1910, the same was by the defendant and the said Mary M. Smith, rescinded and annulled and held for naught.

WHEREFORE, defendant prays judgment:

1. That plaintiff's third cause of action be dismissed.

2. For her costs and disbursements herein expended and incurred.

FOR ANSWER TO PLAINTIFF'S FOURTH CAUSE OF ACTION, DEFENDANT states and alleges:

I.

Defendant admits that plaintiff is a sister of Mary M. Smith; but denies that at the several times in plaintiff's complaint mentioned, or at any other time or at all except as hereinafter specifically set forth, the said Mary M. Smith was the owner of those certain lots, pieces or parcels of land situated in the City of Lewistown, County of Fergus, State of Montana, designated or described as Lots numbered Three (3) and Four (4), Block lettered "O" in Seventeen (17) of the original Townsite of Lewistown, Fergus County, Montana, together with the buildings or structures thereon situated, known as the Hoffman House.

II.

ADMITS that on, to-wit: the 14th day of March, 1910, the said Mary M. Smith conveyed said land and premises by deed to the defendant, Sadie Hoffman, a copy of which deed is attached to plaintiff's com-

plaint, marked Exhibit "A"; but denies that contemporaneously with the said deed or conveyance, or as a part of the same transaction or for the purpose of showing or evidencing the nature and intent with which said deed and conveyance was executed, or otherwise or at all except as hereinafter set forth, the said Mary M. Smith, or the said Sadie Hoffman, the defendant herein, made or executed a certain agreement or contract in writing in the form or language set forth in paragraph 2, division II, of plaintiff's complaint; but alleges the truth and fact to be that the said memorandum was entered into after the making, execution and delivery of the said deed, and the making and signing of the said writing set forth in said paragraph 2 was not made a condition precedent to the delivery of the said deed, and was not, and is not, any consideration whatsoever therefor; but the said writing was entered into at the request of the said Mary M. Smith without any consideration whatsoever therefor. Defendant admits that the deed in said writing referred to, was intended to refer to the deed Exhibit "A" to plaintiff's complaint, and the Hoffman House therein referred to was intended to refer to the premises set out and described in subdivision I of plaintiff's *fourth cause* of action; and admits that the name therein contained, to-wit: Mrs. J. A. McNaught, does and was intended to refer to the plaintiff herein; but denies that no other or further consideration for the said deed passed or was given by the said defendant than the carrying out and fulfillment of the conditions of such agreement or con-

tract. Defendant denies that thereupon said papers, or any of said papers except the said deed, were delivered; and denies that the defendant in pursuance thereof, or except in pursuance of the said deed, entered into the possession or enjoyment of the said premises; but admits that since the execution and delivery of the said deed the defendant has continued, and is now in the enjoyment of the possession of the said premises.

III.

DENIES that the defendant, in pursuance of the aforesaid transaction, or otherwise or at all except in furtherance of the request of the said Mary M. Smith, paid to the plaintiff the sum of Fifty (\$50.00) Dollars a month down to, to-wit: the 14th day of October, 1910; but admits that defendant has since the said time, wholly failed to pay the plaintiff any further sums of money whatsoever, and denies that she has often, or otherwise or at all been requested so to do; and defendant further alleges that no moneys whatsoever were paid to plaintiff in pursuance of, or in furtherance of any such contract, as is specified and set forth in plaintiff's complaint herein; but that the said paper writing set forth in subdivision II of plaintiff's fourth cause of action, was executed by the said Mary M. Smith and the said Sadie Hoffman with the distinct understanding that the terms and phrase "unlimited time thereon" was to be taken and understood by the said Mary M. Smith and the said Sadie Hoffman to mean and be construed as such time as might be necessary for the said Mary M. Smith to

make arrangements from some other source to care for and provide for the said plaintiff; and the same was executed and delivered with that interpretation and that understanding being placed upon the said instrument and had by the said parties thereto; and that on or about the 9th day of October, 1910, the said Mary M. Smith notified and informed the defendant of and concerning the said writing so set forth in subdivision II of plaintiff's fourth cause of action herein:

“Dear Sadie: . . . Now a little business, dear. We signed a contract while you were in Calif. When I go back I will burn it up. You can have the Hoffman House, grounds and its furnishings, and when you are through with it, it can go to Mabel, for I feel you have earned it. It will always give you a support should you lease it, when you get too (lazy) to run it, not (too old), so you need make no other deed. Sincerely,
Mary M. Smith.”

That in accordance with the purpose and intent of the said writing, set forth in subdivision II of plaintiff's fourth cause of action, the said notice of October 9th, 1910, was intended to and did relieve this defendant of and from any other or further obligation under and by virtue of the said memorandum made the basis of this action.

IV.

ADMITS that prior to the commencement of this action a demand was made upon defendant to pay the plaintiff the sums of money claimed to be due to

her by reason of the said alleged contract and agreement, and admits that defendant has refused and neglected to comply with the said demand and does continue such refusal and neglect; but denies each and every allegation, matter and thing contained in subdivision V of plaintiff's fourth cause of action.

V.

DENIES each and every allegation, matter and thing set forth and contained in plaintiff's *fourth* cause of action herein, not hereby specifically admitted, qualified or denied.

FOR A SEPARATE, SECOND AND FURTHER DEFENSE TO PLAINTIFF'S FOURTH CAUSE OF ACTION HEREIN, defendant states and alleges:

I.

That the said alleged cause of action of plaintiff is barred under and by virtue of the provisions of Sections 6443-6445 of the Revised Codes of Montana, which read as follows:

"The periods prescribed for the commencement of action other than for the recovery of real property are as follows: . . . within 8 years: an action upon any contract, obligation or liability founded upon an instrument in writing."

FOR A SEPARATE, THIRD AND FURTHER DEFENSE TO PLAINTIFF'S FOURTH CAUSE OF ACTION HEREIN, the defendant states and alleges:

I.

That on the date of the execution of the said writing

set forth in paragraph II of said *fourth* cause of action, the said Mary M. Smith was not indebted to or under any obligation whatsoever to the said plaintiff therein named as Mrs. J. A. McNaught, and there was no consideration whatsoever passed from the said plaintiff to the said Mary M. Smith or to this defendant to support the said instrument; and that after the execution and delivery of the said instrument, to-wit: on or about the 14th day of October, 1910, the same was by the defendant and the said Mary M. Smith, rescinded and annulled and held for naught.

WHEREFORE, defendant prays judgment:

1. That plaintiff's fourth cause of action be dismissed.
2. For her costs and disbursements herein expended and incurred.

FOR ANSWER TO PLAINTIFF'S FIFTH CAUSE OF ACTION, DEFENDANT states and alleges:

I.

Defendant admits that plaintiff is a sister of Mary M. Smith; but denies that at the several times in plaintiff's complaint mentioned, or at any other time or at all, except as hereinafter specifically set forth, the said Mary M. Smith was the owner of those certain lots, pieces or parcels of land situated in the City of Lewistown, County of Fergus, State of Montana, designated or described as lots numbered Three (3) and Four (4), Block lettered "O" in Seventeen (17) of the original Townsite of Lewistown, Fergus County, Montana, together with the buildings or structures thereon

situated, known as the Hoffman House.

II.

ADMITS that on, to-wit: the 14th day of March, 1910, the said Mary M. Smith conveyed said land and premises by deed to the defendant, Sadie Hoffman, a copy of which deed is attached to plaintiff's complaint, marked Exhibit "A"; but denies that contemporaneously with the said deed or conveyance, or as a part of the same transaction or for the purpose of showing or evidencing the nature and intent with which said deed and conveyance was executed, or otherwise or at all except as hereinafter set forth, the said Mary M. Smith, or the said Sadie Hoffman, the defendant herein, made or executed a certain agreement or contract in writing in the form or language set forth in paragraph 2, division II of plaintiff's complaint; but alleges the truth and fact to be that the said memorandum was entered into after the making, execution and delivery of the said deed, and the making and signing of the said writing set forth in said paragraph 2 was not made a condition precedent to the delivery of the said deed, and was not, and is not, any consideration whatsoever therefor; but the said writing was entered into at the request of the said Mary M. Smith without any consideration whatsoever therefor. Defendant admits that the deed in said writing referred to, was intended to refer to the deed Exhibit "A" to plaintiff's complaint, and the Hoffman House therein referred to was intended to refer to the premises set out and described in subdivision I of plaintiff's *fifth cause* of action; and

admits that the name therein contained, to-wit: Mrs. J. A. McNaught, does and was intended to refer to the plaintiff herein; but denies that no other or further consideration for the said deed passed or was given by the said defendant than the carrying out and fulfillment of the conditions of such agreement or contract. Defendant denies that thereupon said papers, or any of said papers except the said deed, were delivered; and denies that the defendant in pursuance thereof, or except in pursuance of the said deed, entered into the possession or enjoyment of the said premises; but admits that since the execution and delivery of the said deed the defendant has continued, and is now in the enjoyment of the possession of the said premises.

III.

DENIES that the defendant, in pursuance of the aforesaid transaction, or otherwise or at all except in furtherance of the request of the said Mary M. Smith, paid to the plaintiff the sum of Fifty (\$50.00) Dollars a month down to, to-wit: the 14th day of October, 1910; but admits that defendant has since the said time, wholly failed to pay the plaintiff any further sums of money whatsoever, and denies that she has often, or otherwise or at all been requested so to do; and defendant further alleges that no moneys whatsoever were paid to plaintiff in pursuance of, or in furtherance of any such contract, as is specified and set forth in plaintiff's complaint herein; but that the said paper writing set forth in subdivision II of plaintiff's fifth cause of action, was executed by the

said Mary M. Smith and the said Sadie Hoffman with the distinct understanding that the terms and phrase "unlimited time thereon" was to be taken and understood by the said Mary M. Smith and the said Sadie Hoffman to mean and be construed as such time as might be necessary for the said Mary M. Smith to make arrangements from some other source to care for and provide for the said plaintiff; and the same was executed and delivered with that interpretation and that understanding being placed upon the said instrument and had by the said parties thereto; and that on or about the 9th day of October, 1910, the said Mary M. Smith notified and informed the defendant of and concerning the said writing so set forth in subdivision II of plaintiff's fifth cause of action herein:

"Dear Sadie: . . . Now a little business, dear. We signed a contract while you were in Calif. When I go back I will burn it up. You can have the Hoffman House, grounds and its furnishings, and when you are through with it, it can go to Mabel, for I feel you have earned it. It will always give you a support should you lease it, when you get too (lazy) to run it, not (too old), so you need make no other deed. Sincerely,
Mary M. Smith."

That in accordance with the purpose and intent of the said writing, set forth in subdivision II of plaintiff's fifth cause of action, the said notice of October 9th, 1910, was intended to and did relieve this defendant of and from any other or further obligation under and by virtue of the said memorandum made

the basis of this action.

IV.

ADMITS that prior to the commencement of this action a demand was made upon defendant to pay the plaintiff the sums of money claimed to be due to her by reason of the said alleged contract and agreement, and admits that defendant has refused and neglected to comply with the said demand and does continue such refusal and neglect; but denies each and every allegation, matter and thing contained in subdivision V of plaintiff's fifth cause of action.

V.

DENIES each and every allegation, matter and thing set forth and contained in plaintiff's *fifth* cause of action herein, not hereby specifically admitted, qualified or denied.

FOR A SEPARATE, SECOND AND FURTHER DEFENSE TO PLAINTIFF'S FIFTH CAUSE OF ACTION HEREIN, defendant states and alleges:

I.

That the said alleged cause of action of plaintiff is barred under and by virtue of the provisions of Sections 6443-6445 of the Revised Codes of Montana, which read as follows:

"The periods prescribed for the commencement of action other than for the recovery of real property are as follows: . . . within 8 years: an action upon any contract, obligation or liability founded upon an instrument in writing."

FOR A SEPARATE, THIRD AND FURTHER DEFENSE TO PLAINTIFF'S FIFTH CAUSE OF ACTION HEREIN, the defendant states and alleges:

I.

That on the date of the execution of the said writing set forth in paragraph II of said *fifth* cause of action, the said Mary M. Smith was not indebted to or under any obligation whatsoever to the said plaintiff therein named as Mrs. J. A. McNaught, and there was no consideration whatsoever passed from the said plaintiff to the said Mary M. Smith or to this defendant to support the said instrument; and that after the execution and delivery of the said instrument, to-wit: on or about the 14th day of October, 1910, the same was by the defendant and the said Mary M. Smith, rescinded and annulled and held for naught.

WHEREFORE, defendant prays judgment:

1. That plaintiff's fifth cause of action be dismissed.

2. For her costs and disbursements herein expended and incurred.

FOR ANSWER TO PLAINTIFF'S SIXTH CAUSE OF ACTION, DEFENDANT states and alleges:

I.

Defendant admits that plaintiff is a sister of Mary M. Smith; but denies that at the several times in plaintiff's complaint mentioned, or at any other time or at all except as hereinafter specifically set forth, the said Mary M. Smith was the owner of those certain lots, pieces or parcels of land situated in the City of Lewis-

town, County of Fergus, State of Montana, designated or described as lots numbered Three (3) and Four (4), Block lettered "O" in Seventeen (17) of the original Townsite of Lewistown, Fergus County, Montana, together with the bulidings or structures thereon situated, known as the Hoffman House.

II.

ADMITS that on, to-wit: the 14th day of March, 1910, the said Mary M. Smith conveyed said land and premises by deed to the defendant, Sadie Hoffman, a copy of which deed is attached to plaintiff's complaint, marked Exhibit "A"; but denies that contemporaneously with the said deed or conveyance, or as a part of the same transaction or for the purpose of showing or evidencing the nature and intent with which said deed and coneyance was executed, or otherwise or at all except as hereinafter set forth, the said Mary M. Smith, or the said Sadie Hoffman, the defendant herein, made or executed a certain agreement or contract in writing in the form or language set forth in paragraph 2, division II, of plaintiff's complaint; but alleges the truth and fact to be that the said memorandum was entered into after the making, execution and delivery of the said deed, and the making and signing of the said writing set forth in said paragraph 2 was not made a condition precedent to the delivery of the said deed, and was not and is not any consideration whatsoever therefor; but the said writing was entered into at the request of the said Mary M. Smith without any consideration whatsoever therefor. Defendant admits that the deed in said writing referred

to, was intended to refer to the deed Exhibit "A" to plaintiff's complaint, and the Hoffman House therein referred to was intended to refer to the premises set out and described in subdivision I of plaintiff's *sixth* cause of action; and admits that the name therein contained, to-wit: Mrs. J. A. McNaught, does and was intended to refer to the plaintiff herein; but denies that no other or further consideration for the said deed passed or was given by the said defendant than the carrying out and fulfillment of the conditions of such agreement or contract. Defendant denies that thereupon said papers, or any of said papers except the said deed, were delivered; and denies that the defendant in pursuance thereof, or except in pursuance of the said deed, entered into the possession or enjoyment of the said premises; but admits that since the execution and delivery of the said deed the defendant has continued, and is now in the enjoyment of the possession of the said premises.

III.

Denies that the defendant, in pursuance of the aforesaid transaction, or otherwise or at all except in furtherance of the request of the said Mary M. Smith, paid to the plaintiff the sum of Fifty (\$50.00) Dollars a month down to, to-wit: the 14th day of October, 1910; but admits that defendant has since the said time, wholly failed to pay the plaintiff any further sums of money whatsoever, and denies that she has often, or otherwise or at all been requested so to do; and defendant further alleges that no moneys whatsoever were paid to plaintiff in pursuance of, or in fur-

therance of any such contract, as is specified and set forth in plaintiff's complaint herein; but that the said paper writing set forth in subdivision II of plaintiff's sixth cause of action, was executed by the said Mary M. Smith and the said Sadie Hoffman with the distinct understanding that the terms and phrase "unlimited time thereon" was to be taken and understood by the said Mary M. Smith and the said Sadie Hoffman to mean and be construed as such time as might be necessary for the said Mary M. Smith to make arrangements from some other source to care for and provide for the said plaintiff; and the same was executed and delivered with that interpretation and that understanding being placed upon the said instrument and had by the said parties thereto; and that on or about the 9th day of October, 1910, the said Mary M. Smith notified and informed the defendant of and concerning the said writing so set forth in subdivision II of plaintiff's sixth cause of action herein:

"Dear Sadie: . . . Now a little business, dear. We signed a contract while you were in Calif. When I go back I will burn it up. You can have the Hoffman House, grounds and its furnishings, and when you are through with it, it can go to Mabel, for I feel you have earned it. It will always give you a support should you lease it, when you get too (lazy) to run it, not (too old), so you need make no other deed. Sincerely,
Mary M. Smith."

That in accordance with the purpose and intent of the said writing set forth in subdivision II of plain-

tiff's sixth cause of action, the said notice of October 9th, 1910, was intended to and did relieve this defendant of and from any other or further obligation under and by virtue of the said memorandum made the basis of this action.

IV.

ADMITS that prior to the commencement of this action a demand was made upon defendant to pay the plaintiff the sums of money claimed to be due to her by reason of the said alleged contract and agreement, and admits that defendant has refused and neglected to comply with the said demand and does continue such refusal and neglect; but denies each and every allegation, matter and thing contained in subdivision V of plaintiff's sixth cause of action.

V.

DENIES each and every allegation, matter and thing set forth and contained in plaintiff's *sixth* cause of action herein, not hereby specifically admitted, qualified or denied.

FOR A SEPARATE, SECOND AND FURTHER DEFENSE TO PLAINTIFF'S SIXTH CAUSE OF ACTION HEREIN, defendant states and alleges:

I.

That the said alleged cause of action of plaintiff is barred under and by virtue of the provisions of Sections 6443-6445 of the Revised Codes of Montana, which read as follows:

“The periods prescribed for the commencement of action other than for the recovery of real property are as follows: . . . within 8 years:

an action upon any contract, obligation or liability founded upon an instrument in writing.”

FOR A SEPARATE, THIRD AND FURTHER DEFENSE TO PLAINTIFF'S SIXTH CAUSE OF ACTION HEREIN, the defendant states and alleges:

I.

That on the date of the execution of the said writing set forth in paragraph II of said sixth cause of action, the said Mary M. Smith was not indebted to or under any obligation whatsoever to the said plaintiff therein named as Mrs. J. A. McNaught, and there was no consideration whatsoever passed from the said plaintiff to the said Mary M. Smith or to this defendant to support the said instrument; and that after the execution and delivery of the said instrument, to-wit: on or about the 14th day of October, 1910, the same was by the defendant and the said Mary M. Smith, rescinded and annulled and held for naught.

WHEREFORE, defendant prays judgment:

1. That plaintiff's sixth cause of action be dismissed.

2. For her costs and disbursements herein expended and incurred.

FOR ANSWER TO PLAINTIFF'S SEVENTH CAUSE OF ACTION, DEFENDANT states and alleges:

I.

Defendant admits that plaintiff is a sister of Mary M. Smith; but denies that at the several times in plaintiff's complaint mentioned, or at any other time or at all except as hereinafter specifically set forth, the

and defendant further alleges that no moneys whatsoever were paid to plaintiff in pursuance of, or in furtherance of any such contract, as is specified and set forth in plaintiff's complaint herein; but that the said paper writing set forth in subdivision II of plaintiff's seventh cause of action, was executed by the said Mary M. Smith and the said Sadie Hoffman with the distinct understanding that the terms and phrase "unlimited time thereon" was to be taken and understood by the said Mary M. Smith and the said Sadie Hoffman to mean and be construed as such time as might be necessary for the said Mary M. Smith to make arrangements from some other source to care for and provide for the said plaintiff; and the same was executed and delivered with that interpretation and that understanding being placed upon the said instrument and had by the said parties thereto; and that on or about the 9th day of October, 1910, the said Mary M. Smith notified and informed the defendant of and concerning the said writing so set forth in subdivision II of plaintiff's seventh cause of action herein:

"Dear Sadie: . . . Now a little business, dear. We signed a contract while you were in Calif. When I go back I will burn it up. You can have the Hoffman House, grounds and its furnishings, and when you are through with it, it can go to Mabel, for I feel that you have earned it. It will always give you a support should you lease it, when you get too (lazy) to run it, not (too old), so you need make no other deed. Sincerely,

Mary M. Smith."

That in accordance with the purpose and intent of the said writing, set forth in subdivision II of plaintiff's seventh cause of action, the said notice of October 9th, 1910, was intended to and did relieve this defendant of and from any other or further obligation under and by virtue of the said memorandum made the basis of this action.

IV.

ADMITS that prior to the commencement of this action a demand was made upon defendant to pay the plaintiff the sums of money claimed to be due to her by reason of the said alleged contract and agreement, and admits that defendant has refused and neglected to comply with the said demand and does continue such refusal and neglect; but denies each and every allegation, matter and thing contained in subdivision V of plaintiffs' seventh cause of action.

V.

DENIES each and every allegation, matter and thing set forth and contained in plaintiff's *seventh* cause of action herein, not hereby specifically admitted, qualified or denied.

FOR A SEPARATE, SECOND AND FURTHER DEFENSE TO PLAINTIFF'S SEVENTH CAUSE OF ACTION HEREIN, defendant states and alleges:

I.

That the said alleged cause of action of plaintiff is barred under and by virtue of the provisions of Sections 6443-6445 of the Revised Codes of Montana, which read as follows:

"The periods prescribed for the commence-

ment of action other than for the recovery of real property are as follows: . . . within 8 years: an action upon any contract, obligation or liability founded upon an instrument in writing.”

FOR A SEPARATE, THIRD AND FURTHER DEFENSE to plaintiff's *seventh* cause of action herein, the defendant states and alleges:

I.

That on the date of the execution of the said writing set forth in paragraph II of said *seventh* cause of action, the said Mary M. Smith was not indebted to or under any obligation whatsoever to the said plaintiff therein named as Mrs. J. A. McNaught, and there was no consideration whatsoever passed from the said plaintiff to the said Mary M. Smith or to this defendant to support the said instrument; and that after the execution and delivery of the said instrument, to-wit: on or about the 14th day of October, 1910, the same was by the defendant and the said Mary M. Smith, rescinded and annulled and held for naught.

WHEREFORE, defendant prays judgment:

1. That plaintiff's seventh cause of action be dismissed.

2. For her costs and disbursements herein expended and incurred.

FOR ANSWER TO PLAINTIFF'S EIGHTH CAUSE OF ACTION, DEFENDANT states and alleges:

I.

Defendant admits that plaintiff is a sister of Mary M. Smith; but denies that at the several times in plain-

tiff's complaint mentioned, or at any other time or at all except as hereinafter specifically set forth, the said Mary M. Smith was the owner of those certain lots, pieces or parcels of land situated in the City of Lewistown, County of Fergus, State of Montana, designated or described as lots numbered Three (3) and Four (4), Block lettered "O" in Seventeen (17) of the original Townsite of Lewistown, Fergus County, Montana, together with the buildings or structures thereon situated, known as the Hoffman House.

II.

ADMITS that on, to-wit: the 14th day of March, 1910, the said Mary M. Smith conveyed said land and premises by deed to the defendant, Sadie Hoffman, a copy of which deed is attached to plaintiff's complaint, marked Exhibit "A"; but denies that contemporaneously with the said deed or conveyance, or as a part of the same transaction or for the purpose of showing or evidencing the nature and intent with which said deed and conveyance was executed, or otherwise or at all except as hereinafter set forth, the said Mary M. Smith, or the said Sadie Hoffman, the defendant herein, made or executed a certain agreement or contract in writing in the form or language set forth in paragraph 2 division II of plaintiff's complaint; but alleges the truth and fact to be that the said memorandum was entered into after the making, execution and delivery of the said deed, and the making and signing of the said writing set forth in said paragraph 2 was not made a condition precedent to the delivery of the said deed, and was not, and is not, any considera-

tion whatsoever therefor; but the said writing was entered into at the request of the said Mary M. Smith without any consideration whatsoever therefor. Defendant admits that the deed in said writing referred to, was intended to refer to the deed, Exhibit "A" to plaintiff's complaint, and the Hoffman House therein referred to was intended to refer to the premises set out and described in subdivision 1 of plaintiff's *eighth cause* of action; and admits that the name therein contained, to-wit: Mrs. J. A. McNaught, does and was intended to refer to the plaintiff herein; but denies that no other or further consideration for the said deed passed or was given by the said defendant than the carrying out and fulfillment of the conditions of such agreement or contract. Defendant denies that thereupon said papers, or any of said papers except the said deed, were delivered; and denies that the defendant in pursuance thereof, or except in pursuance of the said deed, entered into the possession or enjoyment of the said premises; but admits that since the execution and delivery of the said deed the defendant has continued, and is now in the enjoyment of the possession of the said premises.

III.

DENIES that the defendant, in pursuance of the aforesaid transaction, or otherwise or at all except in furtherance of the request of the said Mary M. Smith, paid to the plaintiff the sum of Fifty (\$50.00) dollars a month down to, to-wit: the 14th day of October, 1910; but admits that defendant has since the said time, wholly failed to pay the plaintiff any fur-

ther sums of money whatsoever, and denies that she has often, or otherwise or at all been requested so to do; and defendant further alleges that no moneys whatsoever were paid to plaintiff in pursuance of, or in furtherance of any such contract, as is specified and set forth in plaintiff's complaint herein; but that the said paper writing set forth in subdivision II of plaintiff's eighth cause of action, was executed by the said Mary M. Smith and the said Sadie Hoffman with the distinct understanding that the terms and phrase "unlimited time thereon" was to be taken and understood by the said Mary M. Smith and the said Sadie Hoffman to mean and be construed as such time as might be necessary for the said Mary M. Smith to make arrangements from some other source to care for and provide for the said plaintiff; and the same was executed and delivered with that interpretation and that understanding being placed upon the said instrument and had by the said parties thereto; and that on or about the 9th day of October, 1910, the said Mary M. Smith notified and informed the defendant of and concerning the said writing so set forth in subdivision II of plaintiff's eighth cause of action herein:

"Dear Sadie: . . . Now a little business, dear. We signed a contract while you were in Calif. When I go back I will burn it up. You can have the Hoffman House, grounds and its furnishings, and when you are through with it, it can go to Mabel for I feel you have earned it. It will always give you a support should you lease it, when you get too (lazy) to run it, not (too old).

so we need make no other deed. Sincerely,
Mary M. Smith."

That in accordance with the purpose and intent of the said writing set forth in subdivision II of plaintiff's eighth cause of action, the said notice of October 9th,, 1910, was intended to and did relieve this defendant of and from any other or further obligation under and by virtue of the said memorandum made the basis of this action.

IV.

ADMITS that prior to the commencement of this action a demand was made upon defendant to pay the plaintiff the sums of money claimed to be due to her by reason of the said alleged contract and agreement, and admits that defendant has refused and neglected to comply with the said demand and does continue such refusal and neglect; but denies each and every allegation, matter and thing contained in subdivision V of plaintiff's eighth cause of action.

V.

DENIES each and every allegation, matter and thing set forth and contained in plaintiff's *eighth* cause of action herein, not hereby specifically admitted, qualified or denied.

FOR A SEPARATE, SECOND AND FURTHER DEFENSE TO PLAINTIFF'S EIGHTH CAUSE OF ACTION HEREIN, defendant states and alleges:

I.

That the said alleged cause of action of plaintiff is barred under and by virtue of the provisions of Sections 6443-6445 of the Revised Codes of Mon-

tana, which read as follows:

“The periods prescribed for the commencement of action other than for the recovery of real property are as follows: . . . within 8 years: an action upon any contract, obligation or liability founded upon an instrument in writing.”

FOR A SEPARATE, THIRD AND FURTHER DEFENSE TO PLAINTIFF'S EIGHTH CAUSE OF ACTION HEREIN, the defendant states and alleges:

I.

That on the date of the execution of the said writing set forth in paragraph II of said *eighth* cause of action, the said Mary M. Smith was not indebted to or under any obligation whatsoever to the said plaintiff therein named as Mrs. J. A. McNaught, and there was no consideration whatsoever passed from the said plaintiff to the said Mary M. Smith or to this defendant to support the said instrument; and that after the execution and delivery of the said instrument, to-wit: on or about the 14th day of October, 1910, the same was by the defendant and the said Mary M. Smith, rescinded and annulled and held for naught.

WHEREFORE, defendant prays judgment:

1. That plaintiff's eighth cause of action be dismissed.

2. For her costs and disbursements herein expended and incurred.

FOR ANSWER TO PLAINTIFF'S NINTH CAUSE OF ACTION, DEFENDANT states and alleges:

Dollars a month down to, to-wit: the 14th day of October, 1910; but admits that defendant has since the said time, wholly failed to pay the plaintiff any further sums of money whatsoever, and denies that she has often, or otherwise or at all been requested so to do; and defendant further alleges that no moneys whatsoever were paid to plaintiff in pursuance of, or in furtherance of any such contract, as is specified and set forth in plaintiff's complaint herein; but that the said paper writing set forth in subdivision II of plaintiff's ninth cause of action, was executed by the said Mary M. Smith and the said Sadie Hoffman with the distinct understanding that the terms and phrase "unlimited time thereon" was to be taken and understood by the said Mary M. Smith and the said Sadie Hoffman to mean and be construed as such time as might be necessary for the said Mary M. Smith to make arrangements from some other source to care for and provide for the said plaintiff; and the same was executed and delivered with that interpretation and that understanding being placed upon the said instrument and had by the said parties thereto; and that on or about the 9th day of October, 1910, the said Mary M. Smith notified and informed the defendant of and concerning the said writing so set forth in subdivision II of plaintiff's ninth cause of action herein:

"Dear Sadie: . . . Now a little business, dear. We signed a contract while you were in Calif. When I go back I will burn it up. You can have the Hoffman House, grounds and its furnishings, and when you are through with it, it can go to

Mabel, for I feel you have earned it. It will always give you a support should you lease it, when you get too (lazy) to run it, not (too old), so you need make no other deed. Sincerely,

Mary M. Smith.”

That in accordance with the purpose and intent of the said writing, set forth in subdivision II of plaintiff's ninth cause of action, the said notice of October 9th, 1910, was intended to and did relieve this defendant of and from any other or further obligation under and by virtue of the said memorandum made the basis of this action.

IV.

ADMITS that prior to the commencement of this action a demand was made upon defendant to pay the plaintiff the sums of money claimed to be due to her by reason of the said alleged contract and agreement, and admits that defendant has refused and neglected to comply with the said demand and does continue such refusal and neglect; but denies each and every allegation, matter and thing contained in subdivision V of plaintiff's ninth cause of action.

V.

DENIES each and every allegation, matter and thing set forth and contained in plaintiff's *ninth* cause of action herein, not hereby specifically admitted, qualified or denied.

FOR A SEPARATE, SECOND AND FURTHER DEFENSE TO PLAINTIFF'S NINTH CAUSE OF ACTION HEREIN, defendant states and alleges:

I.

That the said alleged cause of action of plaintiff is barred under and by virtue of the provisions of Sections 6443-6445 of the Revised Codes of Montana, which read as follows:

“The periods prescribed for the commencement of action other than for the recovery of real property are as follows: . . . within 8 years: an action upon any contract, obligation or liability founded upon an instrument in writing.”

FOR A SEPARATE, THIRD AND FURTHER DEFENSE TO PLAINTIFF'S NINTH CAUSE OF ACTION HEREIN, the defendant states and alleges:

I.

That on the date of the execution of the said writing set forth in paragraph II of said *ninth* cause of action, the said Mary M. Smith was not indebted to or under any obligation whatsoever to the said plaintiff therein named as Mrs. J. A. McNaught, and there was no consideration whatsoever passed from the said plaintiff to the said Mary M. Smith or to this defendant to support the said instrument; and that after the execution and delivery of the said instrument, to-wit: on or about the 14th day of October, 1910, the same was by the defendant and the said Mary M. Smith, rescinded and annulled and held for naught.

WHEREFORE, defendant prays judgment:

1. That plaintiff's ~~third~~^{ninth} cause of action be dismissed.
2. For her costs and disbursements herein expended and incurred.

FOR ANSWER TO PLAINTIFF'S TENTH CAUSE OF ACTION, DEFENDANT states and alleges:

I.

Defendant admits that plaintiff is a sister of Mary M. Smith; but denies that at the several times in plaintiff's complaint mentioned, or at any other time or at all except as hereinafter specifically set forth, the said Mary M. Smith was the owner of those certain lots, pieces or parcels of land situated in the City of Lewistown, County of Fergus, State of Montana, designated or described as Lots numbered Three (3) and Four (4), Block lettered "O" in Seventeen (17) of the original Townsite of Lewistown, Fergus County, Montana, together with the buildings or structures thereon situated, known as the Hoffman House.

II.

ADMITS that on, to-wit: the 14th day of March, 1910, the said Mary M. Smith conveyed said land and premises by deed to the defendant, Sadie Hoffman, a copy of which deed is attached to plaintiff's complaint, marked Exhibit "A"; but denies that contemporaneously with the said deed or conveyance, or as a part of the same transaction or for the purpose of showing or evidencing the nature and intent with which said deed and conveyance was executed, or otherwise or at all except as hereinafter set forth, the said Mary M. Smith, or the said Sadie Hoffman, the defendant herein, made or executed a certain agreement or contract in writing in the form or language set forth in paragraph 2, division II, of plaintiff's com-

plaint; but alleges the truth and fact to be that the said memorandum was entered into after the making, execution and delivery of the said deed, and the making and signing of the said writing set forth in said paragraph 2 was not made a condition precedent to the delivery of the said deed, and was not, and is not, any consideration whatsoever therefor; but the said writing was entered into at the request of the said Mary M. Smith without any consideration whatsoever therefor. Defendant admits that the deed in said writing referred to, was intended to refer to the deed Exhibit "A" to plaintiff's complaint, and the Hoffman House therein referred to was intended to refer to the premises set out and described in subdivision I of plaintiff's *tenth* cause of action; and admits that the name therein contained, to-wit: Mrs. J. A. McNaught, does and was intended to refer to the plaintiff herein; but denies that no other or further consideration for the said deed passed or was given by the said defendant than the carrying out and fulfillment of the conditions of such agreement or contract. Defendant denies that thereupon said papers, or any of said papers except the said deed, were delivered; and denies that the defendant in pursuance thereof, or except in pursuance of the said deed, entered into the possession or enjoyment of the said premises; but admits that since the execution and delivery of the said deed the defendant has continued, and is now in the enjoyment of the possession of the said premises.

III.

DENIES that the defendant, in pursuance of the aforesaid transaction, or otherwise or at all except in furtherance of the request of the said Mary M. Smith, paid to the plaintiff the sum of Fifty (\$50.00) Dollars a month down to, to-wit: the 14th day of October, 1910; but admits that defendant has since the said time, wholly failed to pay the plaintiff any further sums of money whatsoever, and denies that she has often, or otherwise or at all been requested so to do; and defendant further alleges that no moneys whatsoever were paid to plaintiff in pursuance of, or in furtherance of any such contract, as is specified and set forth in plaintiff's complaint herein; but that the said paper writing set forth in subdivision II of plaintiff's tenth cause of action, was executed by the said Mary M. Smith and the said Sadie Hoffman with the distinct understanding that the terms and phrase "unlimited time thereon" was to be taken and understood by the said Mary M. Smith and the said Sadie Hoffman to mean and be construed as such time as might be necessary for the said Mary M. Smith to make arrangements from some other source to care for and provide for the said plaintiff; and the same was executed and delivered with that interpretation and that understanding being placed upon the said instrument and had by the said parties thereto; and that on or about the 9th day of October, 1910, the said Mary M. Smith notified and informed the defendant of and concerning the said writing so set forth in subdivision II of plaintiff's tenth cause of

action herein:

“Dear Sadie: . . . Now a little business, dear. We signed a contract while you were in Calif. When I go back I will burn it up. You can have the Hoffman House, grounds and its furnishings, and when you are through with it, it can go to Mabel, for I feel you have earned it. It will always give you a support should you lease it, when you get too (lazy) to run it, not (too old), so you need make no other deed. Sincerely,
Mary M. Smith.”

That in accordance with the purpose and intent of the said writing, set forth in subdivision II of plaintiff's tenth cause of action, the said notice of October 9th, 1910, was intended to and did relieve this defendant of and from any other or further obligation under and by virtue of the said memorandum made the basis of this action.

IV.

ADMITS that prior to the commencement of this action a demand was made upon defendant to pay the plaintiff the sums of money claimed to be due to her by reason of the said alleged contract and agreement, and admits that defendant has refused and neglected to comply with the said demand and does continue such refusal and neglect; but denies each and every allegation, matter and thing contained in subdivision V of plaintiff's tenth cause of action.

V.

DENIES each and every allegation, matter and thing set forth and contained in plaintiff's tenth cause

of action herein, not hereby specifically admitted, qualified or denied.

FOR A SEPARATE, SECOND AND FURTHER DEFENSE TO PLAINTIFF'S TENTH CAUSE OF ACTION HEREIN, defendant states and alleges:

I.

That the said alleged cause of action of plaintiff is barred under and by virtue of the provisions of Sections 6443-6445 of the Revised Codes of Montana, which read as follows:

“The periods prescribed for the commencement of action other than for the recovery of real property are as follows: . . . within 8 years: an action upon any contract, obligation or liability founded upon an instrument in writing.”

FOR A SEPARATE, THIRD AND FURTHER DEFENSE TO PLAINTIFF'S TENTH CAUSE OF ACTION HEREIN, the defendant states and alleges:

I.

That on the date of the execution of the said writing set forth in paragraph II of said *tenth* cause of action, the said Mary M. Smith was not indebted to or under any obligation whatsoever to the said plaintiff therein named as Mrs. J. A. McNaught, and there was no consideration whatsoever passed from the said plaintiff to the said Mary M. Smith or to this defendant to support the said instrument; and that after the execution and delivery of the said instrument, to-wit: on or about the 14th day of October, 1910.

the same was by the defendant and the said Mary M. Smith, rescinded and annulled and held for naught.

WHEREFORE, defendant prays judgment:

1. That plaintiff's tenth cause of action be dismissed.

2. For her costs and disbursements herein expended and incurred.

WHEREFORE, defendant prays judgment:

1. That plaintiff's first cause of action be dismissed.

2. For her costs and disbursements herein expended and incurred.

3. That plaintiff's second cause of action be dismissed.

4. For her costs and disbursements herein expended and incurred.

5. That plaintiff's third cause of action be dismissed.

6. For her costs and disbursements herein expended and incurred.

7. That plaintiff's fourth cause of action be dismissed.

8. For her costs and disbursements herein expended and incurred.

9. That plaintiff's fifth cause of action be dismissed.

10. For her costs and disbursements herein expended and incurred.

11. That plaintiff's sixth cause of action be dismissed.

12. For her costs and disbursements herein expended and incurred.

13. That plaintiff's seventh cause of action be dismissed.

14. For her costs and disbursements herein expended and incurred.

15. That plaintiff's eighth cause of action be dismissed.

16. For her costs and disbursements herein expended and incurred.

17. That plaintiff's ninth cause of action be dismissed.

18. For her costs and disbursements herein expended and incurred.

19. That plaintiff's tenth cause of action be dismissed.

20. For her costs and disbursements herein expended and incurred.

GUNN, RASCH & HALL,
BELDEN & DEKALB,

Attorneys for Defendant.

State of Montana,
County of Fergus,—ss.

O. W. BELDEN, being first duly sworn, deposes and says: that he is one of the attorneys for the defendant named in the foregoing answer and as such makes this verification for and on behalf of the said defendant, for the reason that said defendant is not now within the County of Fergus, which is the County wherein affiant resides; that he has read the foregoing answer and knows the contents thereof; and that the

matters and things therein alleged are true to the best of his knowledge, information and belief.

O. W. BELDEN.

SUBSCRIBED AND SWORN TO, before me, this 14th day of August, 1920.

ELMIE KROHNKE.

Notary Public for the State of Montana, residing at Lewistown, Montana.

(NOTARIAL SEAL) My commission expires May 25, 1923.

Filed: Aug. 16th, 1920. C. R. Garlow, Clerk.

Thereafter on August 26, 1920, plaintiff served and filed her demurrer to certain parts of said answer, which demurrer is in words and figures following, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES, DISTRICT OF MONTANA, HELENA DIVISION.

OLLIE N. McNAUGHT,

Plaintiff,

vs.

SADIE HOFFMAN,

Defendant.

DEMURRER.

The plaintiff demurs to the parts and portions of the answer herein which are hereinafter specifically designated for the reason and on the ground that the same do not state facts sufficient to constitute a defense or counter-claim to plaintiff's causes of action set forth in the complaint herein, or to any of said

causes of action, and that the same are, and each of them is, insufficient in law on the face thereof, to-wit:

I.

All that portion of said answer designated as II on page 1 of said answer after the name Mary M. Smith in the second line of said paragraph.

II.

All that portion of said answer designated as III on pages 1-2 of said answer beginning with the word "but" in line 32 of said page 1 down and including the word "therefor" in line 14 on page 2 of said answer; also the portion of said subdivision III of said answer beginning with the word "but denies" in line 22 on page 2 down to and including the word "premises" in line 29 on page 2 of said answer.

III.

All of that portion of said answer designated as IV on page 3 thereof, save the admission therein continued, in lines 5-7 on page 3 of non-payment since October, 14, 1910.

IV.

All of that portion of said answer designated as VI on page 4 thereof.

V.

All of that portion of said answer designated: "A separate, second and further defense to plaintiff's First cause of action" on page 4 of said answer.

VI.

All that portion of said answer designated: "A separate, third and further defense to plaintiff's first cause of action" on page 4 thereof.

And the said plaintiff demurs to those portions of the attempted defenses to plaintiff's second cause of action herein, beginning on page 5 of said answer for the reasons hereinbefore stated, to-wit:

I.

All that portion of said answer designated as I on page 5 of said answer after the name Mary M. Smith in the second line of said paragraph.

II.

All that portion of said answer designated as II on pages 5-6 of said answer beginning with the word "but" in line 2 of said page 6 down and including the word "therefor" in line 16 on page 6 of said answer; also the portion of said subdivision II of said answer beginning with the words "but denies" in line 23 on page 6 down to and including the word "premises" in line 31 on page 6 of said answer.

III.

All of that portion of said answer designated as III on page 7 thereof, save the admission therein contained, in lines 8-10 on page 7 of non-payment since October 14, 1910.

IV.

All of that portion of said answer designated as V on page 8 thereof.

V.

All of that portion of said answer designated: "A separate, second and further defense to plaintiff's second cause of action" on page 8 of said answer.

VI.

All that portion of said answer designated: "A

separate, third and further defense to plaintiff's second cause of action" on page 9 thereof.

And the said plaintiff demurs to those portions of the attempted defenses to plaintiff's third cause of action herein beginning on page 9 of said answer for the reasons hereinbefore stated, to-wit:

I.

All that portion of said answer designated as I on page 9 of said answer after the name Mary M. Smith in the second line of said paragraph.

II.

All that portion of said answer designated as II on page 10 of said answer beginning with the word "but" in line 5 of said page 10 down and including the word "therefor" in line 19 on page 10 of said answer; also the portion of said subdivision II of said answer beginning with the words "but denies" in line 28 on page 10 down to and including the word "premises" in line 3 on page 11 of said answer.

III.

All of that portion of said answer designated as III on page 11 thereof, save the admission therein contained, in lines 11-13 on page 11 of non-payment since October 14, 1910.

IV.

All of that portion of said answer designated as V on page 12 thereof.

V.

All of that portion of said answer designated: "A separate, second and further defense to plaintiff's third cause of action" on page 12 of said answer.

VI.

All that portion of said answer designated: "A separate, third and further defense to plaintiff's third cause of action" on page 13 thereof.

And the said plaintiff demurs to those portions of the attempted defenses to plaintiff's fourth cause of action herein beginning on page 13 of said answer for the reasons hereinbefore stated, to-wit:

I.

All of that portion of said answer designated as I on page 13 of said answer after the name Mary M. Smith in the second line of said paragraph.

II.

All that portion of said answer designated as II on page 14 of said answer, beginning with the word "but" in line 4 of said page 14 down and including the word "therefor" in line 18 on page 14 of said answer; also the portion of said subdivision II of said answer beginning with the words "but denies" in line 26 on page 14 down to and including the word "premises" in line 1 on page 15 of said answer.

III.

All of that portion of said answer designated as III on page 15 thereof, save the admission therein contained, in lines 10-12 on page 15 of non-payment since October 14, 1910.

IV.

All of that portion of said answer designated as V on page 16 thereof.

V.

All of that portion of said answer designated: "A

separate, second and further defense to plaintiff's fourth cause of action" on page 16 of said answer.

VI.

All that portion of said answer designated: "A separate, third and further defense to plaintiff's fourth cause of action" on page 16 thereof.

And the said plaintiff demurs to those portions of the attempted defenses to plaintiff's fifth cause of action herein beginning on page 17 of said answer for the reasons hereinbefore stated, to-wit:

I.

All that portion of said answer designated as I on page 17 of said answer after the name Mary M. Smith in the second line of said paragraph.

II.

All that portion of said answer designated as II on page 18 of said answer beginning with the word "but" in line 7 of said page 18 down and including the word "therefor" in line 20 on page 18 of said answer; also the portion of said subdivision II of said answer, beginning with the words "but denies" in line 29 on page 18 down to and including the word "premises" in line 4 on page 19 of said answer.

III.

All of that portion of said answer designated as III on page 19 thereof, save the admission therein contained, in lines 12-14 on page 19 of non-payment since October 14, 1910.

IV.

All of that portion of said answer designated as V on page 20 thereof.

V.

All of that portion of said answer designated: "A separate, second and further defense to plaintiff's fifth cause of action" on page 20 of said answer.

VI.

All that portion of said answer designated: "A separate, third and further defense to plaintiff's fifth cause of action" on page 21 thereof.

And the said plaintiff demurs to those portions of the attempted defenses to plaintiff's sixth cause of action herein beginning on page 21 of said answer for the reasons hereinbefore stated, to-wit:

I.

All that portion of said answer designated as I on page 21 of said answer after the name Mary M. Smith in the second line of said paragraph.

II.

All that portion of said answer designated as II on page 22 of said answer beginning with the word "but" in line 8 of said page 22 down and including the word "therefor" in line 21 on page 22 of said answer; also the portion of said subdivision II of said answer beginning with the words "but denies" in line 30 on page 22 down to and including the word "premises" in line 5 on page 23 of said answer.

III.

All of that portion of said answer designated as III on page 23 thereof, save the admission therein contained, in lines 12-15 on page 23 of non-payment since October 14, 1910.

IV.

All of that portion of said answer designated as V on page 24 thereof.

V.

All of that portion of said answer designated: "A separate, second and further defense to plaintiff's sixth cause of action" on page 24 of said answer.

VI.

All that portion of said answer designated: "A separate, third and further defense to plaintiff's sixth cause of action" on page 25 thereof.

And the said plaintiff demurs to those portions of the attempted defenses to plaintiff's seventh cause of action herein beginning on page 25 of said answer for the reasons hereinbefore stated, to-wit:

I.

All that portion of said answer designated as I on page 25 of said answer after the name Mary M. Smith in the second line of said paragraph.

II.

All that portion of said answer designated as II on page 26 of said answer beginning with the word "but" in line 9 of said page 26 down and including the word "therefor" in line 21 on page 26 of said answer; also the portion of said subdivision II of said answer beginning with the words "but denies" in line 30 on page 26 down to and including the word "premises" in line 5 on page 27 of said answer.

III.

All of that portion of said answer designated as III on page 27 thereof, save the admission therein con-

tained, in lines 13-15 on page 27 of non-payment since October 14, 1910.

IV.

All of that portion of said answer designated as V on page 28 thereof.

V.

All of that portion of said answer designated: "A separate, second and further defense to plaintiff's seventh cause of action" on page 28 thereof. *of said answer*

~~And the said plaintiff demurs to those portions of the attempted defenses to plaintiff's eighth cause of action herein beginning on page 28 of said answer for the reasons hereinbefore stated, to-wit:~~

VI.

All that portion of said answer designated: "A separate, third and further defense to plaintiff's seventh cause of action" on page 29 thereof.

And the said plaintiff demurs to those portions of the attempted defenses to plaintiff's eighth cause of action herein beginning on page 29 of said answer for the reasons hereinbefore stated, to-wit:

I.

All that portion of said answer designated as I on page 29 of said answer after the name Mary M. Smith in the second line of said paragraph.

II.

All that portion of said answer designated as II on page 30 of said answer beginning with the word "but" in line 9 of said page 30 down and including the word "therefor" in line 22 on page 30 of said answer; also the portion of said subdivision II of

said answer beginning with the words "but denies" in line 31 on page 30 down to and including the word "premises" in line 6 on page 31 of said answer.

III.

All of that portion of said answer designated as III on page 31 thereof, save the admission therein contained, in lines 14-16 on page 31 of non-payment since October 14, 1910.

IV.

All of that portion of said answer designated as V on page 32 thereof.

V.

All of that portion of said answer designated: "A separate, second and further defense to plaintiff's eighth cause of action" on page 32 ~~thereof~~ *of said answer.*

VI.

All that portion of said answer designated: "A separate, third and further defense to plaintiff's eighth cause of action" on page 33 thereof.

And the said plaintiff demurs to those portions of the attempted defenses to plaintiff's ninth cause of action herein beginning on page 33 of said answer for the reasons hereinbefore stated, to-wit:

I.

All that portion of said answer designated as I on page 33 of said answer after the name Mary M. Smith in the second line of said paragraph.

II.

All that portion of said answer designated as II on page 34 of said answer beginning with the word "but" in line 11 of said page 34 down and including

the word "therefor" in line 24 on page 34 of said answer; also the portion of said subdivision II of said answer beginning with the words "but denies" in line 32 on page 34 of said answer down to and including the word "premises" in line 7 on page 35 of said answer.

III.

All of that portion of said answer designated as III on page 35 thereof, save the admission therein contained, in lines 16-18 on page 35 of non-payment since October 14, 1910.

IV.

All of that portion of said answer designated as V on page 36 thereof.

V.

All of that portion of said answer designated: "A separate, second and further defense to plaintiff's ninth cause of action" on page 36-37 of said answer.

VI.

All that portion of said answer designated: "A separate, third and further defense to plaintiff's ninth cause of action" on page 37 thereof.

And the said plaintiff demurs to those portions of the attempted defenses to plaintiff's tenth cause of action herein beginning on page 37 of said answer for the reasons hereinbefore stated, to-wit:

I.

All that portion of said answer designated as I on page 37 of said answer after the name Mary M. Smith in the second line of said paragraph.

II.

All that portion of said answer designated as II on page 38 of said answer beginning with the word "but" in line 11 of said page down and including the word "therefor" in line 24 on page 38 of said answer; also the portion of said subdivision II of said answer beginning with the words "but denies" in line 32 on page 38 of said answer down to and including the word "premises" in line 8 on page 39 of said answer.

III.

All of that portion of said answer designated as III on page 39 thereof, save the admission therein contained in lines 16-18 on page 39 of non-payment since October 14, 1910.

IV.

All of that portion of said answer designated as V on page 40 thereof.

V.

All of that portion of said answer designated: "A separate, second and further defense to plaintiff's tenth cause of action" on page 40 of said answer.

VI.

All that portion of said answer designated: "A separate, third and further defense to plaintiff's tenth cause of action" on page 41 thereof.

McINTIRE AND MURPHY,

Plaintiff's Attorneys.

Filed: Aug. 26, 1920. C. R. Garlow, Clerk.

And on said 26th day of August, 1920, said plaintiff served and filed her motion to strike certain parts

of said answer, which motion is in words and figures following (the pages referred to in said motion being the paging of original answer and appear in this transcript by the bracketed asterisked numbers in the answer), to-wit:

IN THE DISTRICT COURT OF THE UNITED
STATES, DISTRICT OF MONTANA, HELENA
DIVISION.

OLLIE N. McNAUGHT,

Plaintiff,

vs.

SADIE HOFFMAN,

Defendant

MOTION.

Comes now the said plaintiff and moves the court to strike from the answer of defendant herein all and singular the parts and portions thereof hereinafter specifically designated for the reason that the same are sham, frivolous, irrelevant and immaterial; and for the reason that the same are insufficient in law on the face thereof to constitute a defense or counterclaim to plaintiff's several causes of action set forth in the complaint herein, or to any part thereof, to-wit:

I.

All that portion of said answer designated as II on page 1 of said answer after the name Mary M. Smith in the second line of said paragraph.

II.

All that portion of said answer designated as III

on pages 1-2 of said answer beginning with the word "but" in line 32 of said page 1 down and including the word "therefor" in line 14 on page 2 of said answer; also the portion of said subdivision III of said answer beginning with the words "but denies" in line 22 on page 2 down to and including the word "premises" in line 29 on page 2 of said answer.

III.

All of that portion of said answer designated as IV on page 3 thereof, save the admission therein contained, in lines 5-7 on page 3 of non-payment since October 14, 1910.

IV.

All of that portion of said answer designated as ~~VI~~^V on page 4 thereof.

V.

All of that portion of said answer designated: "A separate, second and further defense to plaintiff's first cause of action" on page 4 of said answer.

VI.

All that portion of said answer designated: "A separate, third and further defense to plaintiff's first cause of action" on page 4 thereof.

And the said plaintiff for the same reasons and on the same grounds moves the court to strike from that portion of said answer reading "For answer to plaintiff's second cause of action" beginning on page 5 of said answer.

I.

All that portion of said answer designated as I on

page 5 of said answer after the name Mary M. Smith in the second line of said paragraph.

II.

All that portion of said answer designated as II on pages 5-6 of said answer beginning with the word "but" in line 2 of said page 6 down and including the word "therefor" in line 16 on page 6 of said answer; also the portion of said subdivision II of said answer beginning with the words "but denies" in line 23 on page 6 down to and including the word "premises" in line 31 on page 6 of said answer.

III.

All of that portion of said answer designated as III on page 7 thereof, save the admission therein contained, in lines 8-10 on page 7 of non-payment since October 14, 1910.

IV.

All of that portion of said answer designated as V on page 8 thereof.

V.

All of that portion of said answer designated: "A separate, second and further defense to plaintiff's second cause of action" on page 8 of said answer.

VI.

All that portion of said answer designated: "A separate, third and further defense to plaintiff's second cause of action" on page 9 thereof.

And the said plaintiff for the same reasons and on the same grounds moves the court to strike from that portion of said answer reading "For answer to plain-

tiff's third cause of action" beginning on page 9 of said answer.

I.

All that portion of said answer designated as I on page 9 of said answer after the name Mary M. Smith in the second line of said paragraph.

II.

All that portion of said answer designated as II on page 9 of said answer beginning with the word "but" in line 5 of said page 10 down and including the word "therefor" in line 19 on page 10 of said answer; also the portion of said subdivision II of said answer beginning with the words "but denies" in line 28 on page 10 down to and including the word "premises" in line 3 on page 11 of said answer.

III.

All of that portion of said answer designated as III on page 11 thereof, save the admission therein contained, in lines 11-13 on page 11 of non-payment since October 14, 1910.

IV.

All of that portion of said answer designated as V on page 12 thereof.

V.

All of that portion of said answer designated: "A separate, second and further defense to plaintiff's third cause of action" on page 12 of said answer.

VI.

All that portion of said answer designated: "A separate, third and further defense to plaintiff's third cause of action" on page 13 thereof.

And the said plaintiff for the same reasons and on the same grounds moves the court to strike from that portion of said answer reading "For answer to plaintiff's fourth cause of action" beginning on page 13 of said answer.

I.

All that portion of said answer designated as I on page 13 of said answer after the name Mary M. Smith in the second line of said paragraph.

II.

All that portion of said answer designated as II on page 14 of said answer beginning with the word "but" in line 4 of said page 14 down and including the word "therefor" in line 18 on page 14 of said answer; also the portion of said subdivision II of said answer beginning with the words "but denies" in line 26 on page 14 down to and including the word "premises" in line 1 on page 15 of said answer.

III.

All of that portion of said answer designated as III on page 15 thereof, save the admission therein contained, in lines 10-12 on page 15 of non-payment since October 14, 1910.

IV.

All of that portion of said answer designated as V on page 16 thereof.

V.

All of that portion of said answer designated: "A separate, second and further defense to plaintiff's fourth cause of action" on page 16 of said answer.

VI.

All that portion of said answer designated "A separate, third and further defense to plaintiff's fourth cause of action" on page 16 thereof.

And the said plaintiff for the same reasons and on the same grounds moves the court to strike from that portion of said answer reading "For answer to plaintiff's fifth cause of action" beginning on page 17 of said answer.

I.

All that portion of said answer designated as I on page 17 of said answer after the name Mary M. Smith in the second line of said paragraph.

II.

All that portion of said answer designated as II on page 18 of said answer beginning with the word "but" in line 7 of said page 18 down and including the word "therefor" in line 20 on page 18 of said answer; also the portion of said subdivision II of said answer beginning with the words "but denies" in line 29 on page 18 down to and including the word "premises" in line 4 on page 19 of said answer.

III.

All of that portion of said answer designated as III on page 19 thereof, save the admission therein contained, in lines 12-14 on page 19 of non-payment since October 14, 1910.

IV.

All of that portion of said answer designated as V' on page 20 thereof.

V.

All of that portion of said answer designated: "A separate, second and further defense to plaintiff's fifth cause of action" on page 20 of said answer.

VI.

All that portion of said answer designated: "A separate, third and further defense to plaintiff's fifth cause of action" on page 21 thereof.

And the said plaintiff for the same reasons and on the same grounds moves the court to strike from that portion of said answer reading "For answer to plaintiff's sixth cause of action" beginning on page 21 of said answer.

I.

All that portion of said answer designated as I on page 21 of said answer after the name Mary M. Smith in the second line of said paragraph.

II.

All that portion of said answer designated as II on page 22 of said answer beginning with the word "but" in line 8 of said page 22 down and including the word "therefor" in line 21 on page 22 of said answer; also the portion of said subdivision II of said answer beginning with the words "but denies" in line 30 on page 22 down to and including the word "premises" in line 5 on page 23 of said answer.

III.

All of that portion of said answer designated as III on page 23 thereof, save the admission therein contained, in lines 12-15 on page 23 of non-payment since October 14, 1910.

IV.

All of that portion of said answer designated as V on page 24 thereof.

V.

All of that portion of said answer designated: "A separate, second and further defense to plaintiff's sixth cause of action" on page 24 of said answer.

VI.

All that portion of said answer designated: "A separate, third and further defense to plaintiff's sixth cause of action" on page 24 thereof.

And the said plaintiff for the same reasons and on the same grounds moves the court to strike from that portion of said answer reading "For answer to plaintiff's seventh cause of action" beginning on page 25 of said answer.

I.

All that portion of said answer designated as I on page 26 of said answer after the name Mary M. Smith in the second line of said paragraph.

II.

All that portion of said answer designated as II on page 26 of said answer beginning with the word "but" in line 9 of said page 26 down and including the word "therefor" in line 21 on page 26 of said answer; also the portion of said subdivision II of said answer beginning with the words "but denies" in line 30 on page 26 down to and including the word "premises" in line 5 on page 27 of said answer.

III.

All of that portion of said answer designated as III

on page 27 thereof, save the admission therein contained, in lines 13-15 on page 27 of non-payment since October 14, 1910.

IV.

All of that portion of said answer designated as V on page 28 thereof.

V.

All of that portion of said answer designated: "A separate, second and further defense to plaintiff's seventh cause of action" on page 28 of said answer.

VI.

All that portion of said answer designated: "A separate, third and further defense to plaintiff's seventh cause of action" on page 29 thereof.

And the said plaintiff for the same reasons and on the same grounds moves the court to strike from that portion of said answer reading "For answer to plaintiff's eighth cause of action" beginning on page 29 of said answer.

I.

All that portion of said answer designated as I on page 29 of said answer after the name Mary M. Smith in the second line of said paragraph.

II.

All that portion of said answer designated as II on page 30 of said answer beginning with the word "but" in line 9 of said page 30 down and including the word "therefor" in line 22 on page 30 of said answer; also the portion of said subdivision II of said answer beginning with the words "but denies" in line

31 on page 30 down to and including the word “premises” in line 6 on page 31 of said answer.

III.

All of that portion of said answer designated as III on page 31 thereof, save the admission therein contained, in lines 14-16 on page 31 of non-payment since October 14, 1910.

IV.

All of that portion of said answer designated as V on page 32 thereof.

V.

All of that portion of said answer designated: “A separate, second and further defense to plaintiff’s eighth cause of action” on page 32 of said answer.

VI.

All that portion of said answer designated: “A separate, third and further defense to plaintiff’s eighth cause of action on page 33 thereof.

And the said plaintiff for the same reasons and on the same grounds moves the court to strike from that portion of said answer reading “For answer to plaintiff’s ninth cause of action” beginning on page 33 of said answer.

I.

All that portion of said answer designated as I on page 33 of said answer after the name Mary M. Smith in the second line of said paragraph.

II.

All that portion of said answer designated as II on page 34 of said answer beginning with the word “but” in line 11 of said page 34 down and including the

word "therefor" in line 24 on page 34 of said answer; also the portion of said subdivision II of said answer beginning with the words "but denies" in line 32 on page 34 of said answer down to and including the word "premises" in line 7 on page 35 of said answer.

III.

All of that portion of said answer designated as III on page 35 thereof, save the admission therein contained, in lines 16-18 on page 35 of non-payment since October 14, 1910.

IV.

All of that portion of said answer designated as V on page 36 thereof.

V.

All of that portion of said answer designated: "A separate, second and further defense to plaintiff's ninth cause of action" on pages 36-37 of said answer.

VI.

All that portion of said answer designated: "A separate, third and further defense to plaintiff's ninth cause of action" on page 37 thereof.

And the said plaintiff for the same reasons and on the same grounds moves the court to strike from that portion of said answer reading "For answer to plaintiff's tenth cause of action" beginning on page 37 of said answer.

I.

All that portion of said answer designated as I on page 38 of said answer after the name Mary M. Smith in the second line of said paragraph.

II.

All that portion of said answer designated as II on page 38 of said answer beginning with the word "but" in line 11 of said page 38 down and including the word "therefor" in line 24 on page 38 of said answer; also the portion of said subdivision II of said answer beginning with the words "but denies" in line 32 on page 38 of said answer down to and including the word "premises" in line 8 on page 39 of said answer.

III.

All of that portion of said answer designated as III on page 39 thereof, save the admission therein contained, in lines 16-18 on page 39 of non-payment since October 14, 1910.

IV.

All of that portion of said answer designated as V on page 40 thereof.

V.

All of that portion of said answer designated: "A separate, second and further defense to plaintiff's tenth cause of action" on page 40 of said answer.

VI.

All that portion of said answer designated: "A separate, third and further defense to plaintiff's tenth cause of action" on page 41 thereof.

McINTIRE AND MURPHY,
Plaintiff's Attorneys.

Filed: Aug. 26, 1920.

C. R. Garlow, Clerk.

That thereafter said motion to strike and demurrer of plaintiff to certain parts of said answer of defendant having come on regularly for hearing and being argued to the court and by the court taken under advisement, the court on the 30th day of October, 1920, rendered its opinion upon said motion and demurrer in words and figures following, to-wit:

UNITED STATES DISTRICT COURT—MONTANA.

McNaught

vs.

Hoffman.

The pleadings referred to, although not always easy to distinguish trusts and covenants, from conditions subsequent, the conclusion of the Montana Supreme Court that the involved transaction between Smith and defendant is of the latter category, is clearly right.

No intent to create a trust or gift in trust appears, for the payments to plaintiff are not charged upon the body or rents of the property involved, and on the whole are optional with defendant. No covenant is indicated beyond that implied from the language that by defendant, "not less than \$50. per mo. be paid to" plaintiff "for an unlimited time and the deed then will stand good until" defendant's marriage or death, reversion to the grantor Smith or heirs. Therein defendant does not covenant to pay in any event, but only to pay so long as she elects to hold the property secure from re-entry by Smith or heirs. If defendant fails to pay, she is not subject to suit

for damages or to compel payment by even Smith or heirs, much less by plaintiff.

In such contingency defendant is only liable to divestiture of her estate in the property, if Smith or heirs elect to take advantage of defendant's breach, and re-enter upon the property.

The language of the agreement involved crudely sets forth that the payments to plaintiff are of a condition subsequent. If made, "the deed then will stand good." If not made, the deed will no longer "stand good," and the property reverts to Smith or heirs—if they choose to re-enter, because of the failure to pay. If they do not choose to re-enter, but waive the breach, plaintiff cannot take advantage of the breach. And all this is "horn book" law.

Hence, the matter in the answer, alleging that Smith did waive the breach of the condition (defendant's failure to pay plaintiff) is material to the defense, if proven is a good defense, and the motion to strike it is denied and the demurrer to it is overruled.

BOURQUIN

October 30, 1920.

J

Filed: Oct. 30, 1920. C. R. Garlow, Clerk.

That thereafter on November 19, 1920, a reply was filed to said answer which is in words and figures following, to-wit:

IN THE DISTRICT COURT OF THE UNITED
STATES, DISTRICT OF MONTANA, HELENA
DIVISION.

OLLIE N. McNAUGHT,

Plaintiff,

vs.

SADIE HOFFMAN,

Defendant.

REPLICATION.

Comes now the above named plaintiff, Ollie N. McNaught, and files and presents this her reply or replication to the answer of defendant herein.

I.

As and for her reply or replication to the said answer which in anywise controverts the allegations of the complaint which set forth and allege the first count or cause of action in said complaint stated:

(a) She denies that the agreement or contract set forth in paragraph 2 of division II of said complaint was entered into otherwise than mutually by the parties thereto, to-wit, Mary M. Smith and Sadie Hoffman; denies that the same was without consideration passing and given by the said Mary M. Smith to and received by the said Sadie Hoffman therefor, but on the contrary she avers and alleges that there was full and good consideration from the said Mary M. Smith to the said Sadie Hoffman for all the obligations and promises therein and thereby on the part of the latter to be performed.

(b) She denies that the understanding and agreement between the said Mary M. Smith and Sadie Hoffman in and about the making, delivering and entering into by and between them of the said agreement or contract was otherwise than is therein stated and set forth.

(c) Plaintiff admits upon her information and belief that on or about the 9th day of October, 1910, the said Mary M. Smith wrote a letter or writing to the said Sadie Hoffman of the terms and tenor set forth in said answer, but she avers and alleges that the same was the voluntary act of the said Mary M. Smith and that the same was and is wholly without consideration for anything therein contained; that the same was wholly without the knowledge of the plaintiff, and that she, plaintiff, has never consented thereto, or in anywise acquiesced therein; and she denies that said letter or writing was intended to or did relieve the defendant from the obligations she had undertaken toward this plaintiff under and by virtue of said agreement or contract set forth in paragraph 2 of Division II of the complaint herein; and she denies that the last named agreement or contract was ever burned up, destroyed, or in anywise waived, annulled or set aside.

(d) Plaintiff denies that the first count or cause of action set forth in the complaint herein is barred by or under any statute of limitations of the State of Montana, or at all.

(e) She denies that the agreement or contract set forth in paragraph 2, Division II of the complaint

herein has ever been rescinded, annulled, or held for naught.

WHEREFORE, plaintiff prays for judgment on the first count or cause of action set forth in the complaint as in said complaint prayed.

II.

As and for her reply or replication to the said answer which in anywise controverts the allegations of the complaint which set forth and allege the second count or cause of action in said complaint stated:

(a) She denies that the agreement or contract set forth in paragraph 2 of division II of said complaint was entered into otherwise than mutually by the parties thereto, to-wit, Mary M. Smith and Sadie Hoffman; denies that the same was without consideration passing and given by the said Mary M. Smith to and received by the Said Sadie Hoffman therefor, but on the contrary she avers and alleges that there was full and good consideration from the said Mary M. Smith to the said Sadie Hoffman for all the obligations and promises therein and thereby on the part of the latter to be performed.

(b) She denies that the understanding and agreement between the said Mary M. Smith and Sadie Hoffman in and about the making, delivering and entering into by and between them of the said agreement or contract was otherwise than is therein stated and set forth.

(c) Plaintiff admits upon her information and belief that on or about the 9th day of October, 1910, the said Mary M. Smith wrote a letter or writing to

the said Sadie Hoffman of the terms and tenor set forth in said answer, but she avers and alleges that the same was the voluntary act of the said Mary M. Smith and that the same was and is wholly without consideration for anything therein contained; that the same was wholly without the knowledge of the plaintiff, and that she, plaintiff, has never consented thereto, or in anywise acquiesced therein; and she denies that the said letter or writing was intended to or did relieve the defendant from the obligations she had undertaken toward this plaintiff under and by virtue of said agreement or contract set forth in paragraph 2 of Division II of the complaint herein; and she denies that the last named agreement or contract was ever burned up, destroyed, or in anywise waived, annulled or set aside.

(d) Plaintiff denies that the second count or cause of action set forth in the complaint herein is barred by or under any statute of limitations of the State of Montana, or at all.

(e) She denies that the agreement or contract set forth in paragraph 2, Division II of the complaint herein has ever been rescinded, annulled, or held for naught.

WHEREFORE, plaintiff prays for judgment on the second count or cause of action set forth in the complaint as in said complaint prayed.

III.

As and for her reply or replication to the said answer which in anywise controverts the allegations of the complaint which set forth and allege the third

count or cause of action in said complaint stated:

(a) She denies that the agreement or contract set forth in paragraph 2 of Division II of said complaint was entered into otherwise than mutually by the parties thereto, to-wit, Mary M. Smith and Sadie Hoffman; denies that the same was without consideration passing and given by the said Mary M. Smith to and received by the said Sadie Hoffman therefor, but on the contrary she avers and alleges that there was full and good consideration from the said Mary M. Smith to the said Sadie Hoffman for all the obligations and promises therein and thereby on the part of the latter to be performed.

(b) She denies that the understanding and agreement between the said Mary M. Smith and Sadie Hoffman in and about the making, delivering and entering into by and between them of the said agreement or contract was otherwise than is therein stated and set forth.

(c) Plaintiff admits upon her information and belief that on or about the 9th day of October, 1910, the said Mary M. Smith wrote a letter or writing to the said Sadie Hoffman of the terms and tenor set forth in said answer, but she avers and alleges that the same was the voluntary act of the said Mary M. Smith and that the same was and is wholly without consideration for anything therein contained; that the same was wholly without the knowledge of the plaintiff, and that she, plaintiff, has never consented thereto, or in anywise acquiesced therein; and she denies that said letter or writing was intended to or did relieve the defendant from the obligations she had under-

taken toward this plaintiff under and by vitrue of said agreement or contract set forth in paragraph 2 of Division II of the complaint herein; and she denies that the last named agreement or contract was ever burned up destroyed or in anywise waived annulled or set aside.

(d) Plaintiff denies that the third count or cause of action set forth in the complaint herein is barred by or under any statute of limitations of the State of Montana, or at all.

(e) She denies that the agreement or contract set forth in paragraph 2 of Division II of the complaint has ever been rescinded, annulled, or held for naught. *herein*

WHEREFORE, plaintiff prays for judgment on the third count or cause of action set forth in the complaint as in said complaint prayed.

IV.

As and for her reply or replication to the said answer which in anywise controverts the allegations of the complaint which set forth and allege the fourth count or cause of action in said complaint stated:

(a) She denies that the agreement or contract set forth in paragraph 2 of Division II of said complaint was entered into otherwise than mutually by the parties thereto, to-wit, Mary M. Smith and Sadie Hoffman; denies that the same was without consideration passing and given by the said Mary M. Smith to and received by the said Sadie Hoffman therefor, but on the contrary she avers and alleges that there was full and good consideration from the said Mary M. Smith to the said Sadie Hoffman for all the obligations

and promises therein and thereby on the part of the latter to be performed.

(b) She denies that the understanding and agreement between the said Mary M. Smith and Sadie Hoffman in and about the making, delivering and entering into by and between them of the said agreement or contract was otherwise than is therein stated and set forth.

(c) Plaintiff admits upon her information and belief that on or about the 9th day of October, 1910, the said Mary M. Smith wrote a letter or writing to the said Sadie Hoffman of the terms and tenor set forth in said answer, but she avers and alleges that the same was the voluntary act of the said Mary M. Smith and that the same was and is wholly without consideration for anything therein contained; that the same was wholly without the knowledge of the plaintiff, and that she, plaintiff, has never consented thereto, or in anywise acquiesced therein; and she denies that said letter or writing was intended to or did relieve the defendant from the obligations she had undertaken toward this plaintiff under and by virtue of said agreement or contract set forth in paragraph 2 of Division II of the complaint herein; and she denies that the last named agreement or contract was ever burned up, destroyed, or in anywise waived, annulled or set aside.

(d) Plaintiff denies that the fourth count or cause of action set forth in the complaint herein is barred by or under any statute of limitations of the State of Montana, or at all.

(e) She denies that the agreement or contract

set forth in paragraph 2 of Division II of the complaint herein has ever been rescinded, annulled, or held for naught.

WHEREFORE, plaintiff prays for judgment on the fourth count or cause of action set forth in the complaint as in said complaint prayed.

V.

As and for her reply or replication to the said answer which in anywise controverts the allegations of the complaint which set forth and allege the fifth count or cause of action in said complaint stated:

(a) She denies that the agreement or contract set forth in paragraph 2 of Division II of the said complaint was entered into otherwise than mutually by the parties thereto, to-wit, Mary M. Smith and Sadie Hoffman; denies that the same was without consideration passing and given by the said Mary M. Smith to and received by the said Sadie Hoffman therefor, but on the contrary she avers and alleges that there was full and good consideration from the said Mary M. Smith to the said Sadie Hoffman for all the obligations and promises therein and thereby on the part of the latter to be performed.

(b) She denies that the understanding and agreement between the said Mary M. Smith and Sadie Hoffman in and about the making, delivering and entering into by and between them of the said agreement or contract was otherwise than is therein stated and set forth.

(c) Plaintiff admits upon her information and belief that on or about the 9th day of October, 1910, the

said Mary M. Smith wrote a letter or writing to the said Sadie Hoffman of the terms and tenor set forth in said answer, but she avers and alleges that the same was the voluntary act of the said Mary M. Smith and that the same was and is wholly without consideration for anything therein contained; that the same was wholly without the knowledge of the plaintiff, and that she, plaintiff, has never consented thereto, or in anywise acquiesced therein; and she denies that said letter or writing was intended to or did relieve the defendant from the obligations she had undertaken toward this plaintiff under and by virtue of said agreement or contract set forth in paragraph 2 of Division II of the complaint herein; and she denies that the last named agreement or contract was ever burned up, destroyed, or in anywise waived, annulled or set aside.

(d) Plaintiff denies that the fifth count or cause of action set forth in the complaint herein is barred by or under any statute of limitations of the State of Montana, or at all.

(e) She denies that the agreement or contract set forth in paragraph 2, Division II of the complaint herein has ever been rescinded, annulled, or held for naught.

WHEREFORE, plaintiff prays for judgment on the fifth count or cause of action set forth in the complaint as in said complaint prayed.

VI.

As and for her reply or replication to the said answer which in anywise controverts the allegations of the complaint which set forth and alleged the sixth

count or cause of action in said complaint stated:

(a) She denies that the agreement or contract set forth in paragraph 2 of Division II of said complaint was entered into otherwise than mutually by the parties thereto, to-wit, Mary M. Smith and Sadie Hoffman; denies that the same was without consideration passing and given by the said Mary M. Smith to and received by the said Sadie Hoffman therefor, but on the contrary she avers and alleges that there was full and good consideration from the said Mary M. Smith to the said Sadie Hoffman for all the obligations and promises therein and thereby on the part of the latter to be performed.

(b) She denies that the understanding and agreement between the said Mary M. Smith and Sadie Hoffman in and about the making, delivering and entering into by and between them of the said agreement or contract was otherwise than is therein stated and set forth.

(c) Plaintiff admits upon her information and belief that on or about the 9th day of October, 1910, the said Mary M. Smith wrote a letter or writing to the said Sadie Hoffman of the terms and tenor set forth in said answer, but she avers and alleges that the same was the voluntary act of the said Mary M. Smith and that the same was and is wholly without consideration for anything therein contained; that the same was wholly without the knowledge of the plaintiff, and that she, plaintiff, has never consented thereto, or in anywise acquiesced therein; and she denies that said letter or writing was intended to or did relieve

the defendant from the obligations she had undertaken toward this plaintiff under and by virtue of said agreement or contract set forth in paragraph 2 of Division II of the complaint herein; and she denies that the last named agreement or contract was ever burned up, destroyed, or in anywise waived, annulled or set aside.

(d) Plaintiff denies that the sixth count or cause of action set forth in the complaint herein is barred by or under any statute of limitations of the State of Montana, or at all.

(e) She denies that the agreement or contract set forth in paragraph 2, Division II of the complaint herein has ever been rescinded, annulled, or held for naught.

WHEREFORE, plaintiff prays for judgment on the sixth count or cause of action set forth in the complaint as in said complaint prayed.

VII.

As and for her reply or replication to the said answer which in anywise controverts the allegations of the complaint which set forth and allege the seventh count or cause of action in said complaint stated:

(a) She denies that the agreement or contract set forth in paragraph 2 of Division II of said complaint was entered into otherwise than mutually by the parties thereto, to-wit, Mary M. Smith and Sadie Hoffman; denies that the same was without consideration passing and given by the said Mary M. Smith to and received by the said Sadie Hoffman therefor, but on the contrary she avers and alleges that there was full and good consideration from the said Mary M.

Smith to the said Sadie Hoffman for all the obligations and promises therein and thereby on the part of the latter to be performed.

(b) She denies that the understanding and agreement between the said Mary M. Smith and Sadie Hoffman in and about the making, delivering and entering into by and between them of the said agreement or contract was otherwise than is therein stated and set forth.

(c) Plaintiff admits upon her information and belief that on or about the 9th day of October, 1910, the said Mary M. Smith wrote a letter or writing to the said Sadie Hoffman of the terms and tenor set forth in said answer, but she avers and alleges that the same was the voluntary act of the said Mary M. Smith and that the same was and is wholly without consideration for anything therein contained; that the same was wholly without the knowledge of the plaintiff, and that she, plaintiff, has never consented thereto, or in anywise acquiesced therein; and she denies that said letter or writing was intended to or did relieve the defendant from the obligations she had undertaken toward this plaintiff under and by virtue of said agreement or contract set forth in paragraph 2 of Division II of the complaint herein; and she denies that the last named agreement or contract was ever burned up, destroyed, or in anywise waived, annulled or set aside.

(d) Plaintiff denies that the seventh count or cause of action set forth in the complaint herein is barred by or under any statute of limitations of the State of Montana, or at all.

(e) She denies that the agreement or contract set forth in paragraph 2, Division II of the complaint herein has ever been rescinded, annulled, or held for naught.

WHEREFORE, plaintiff prays for judgment on the seventh count or cause of action set forth in the complaint as in said complaint prayed.

VIII.

As and for her reply or replication to the said answer which in anywise controverts the allegations of the complaint which set forth and allege the eighth count or cause of action in said complaint stated:

(a) She denies that the agreement or contract set forth in paragraph 2 of Division II of said complaint was entered into otherwise than mutually by the parties thereto, to-wit, Mary M. Smith and Sadie Hoffman; denies that the same was without consideration passing and given by the said Mary M. Smith to and received by the said Sadie Hoffman therefor, but on the contrary she avers and alleges that there was full and good consideration from the said Mary M. Smith to the said Sadie Hoffman for all the obligations and promises therein and thereby on the part of the latter to be performed.

(b) She denies that the understanding and agreement between the said Mary M. Smith and Sadie Hoffman in and about the making, delivering and entering into by and between them of the said agreement or contract was otherwise than is therein stated and set forth.

(c) Plaintiff admits upon her information and be-

lief that on or about the 9th day of October, 1910, the said Mary M. Smith wrote a letter or writing to the said Sadie Hoffman of the terms and tenor set forth in said answer, but she avers and alleges that the same was the voluntary act of the said Mary M. Smith and that the same was and is wholly without consideration for anything therein contained; that the same was wholly without the knowledge of the plaintiff, and that she, plaintiff, has never consented thereto, or in anywise acquiesced therein; and she denies that said letter or writing was intended to or did relieve the defendant from the obligations she had undertaken toward this plaintiff under and by virtue of said agreement or contract set forth in paragraph 2 of Division II of the complaint herein; and she denies that the last named agreement or contract was ever burned up, destroyed, or in anywise waived, annulled or set aside.

(d) Plaintiff denies that the eighth count or cause of action set forth in the complaint herein is barred by or under any statute of limitations of the State of Montana, or at all.

(e) She denies that the agreement or contract set forth in paragraph 2, Division II of the complaint herein has ever been rescinded, annulled, or held for naught.

WHEREFORE, plaintiff prays for judgment on the eighth count or cause of action set forth in the complaint as in said complaint prayed.

IX.

As and for her reply or replication to the said

answer which in anywise controverts the allegations of the complaint which set forth and allege the ninth count or cause of action in said complaint stated:

(a) She denies that the agreement or contract set forth in paragraph 2 of Division II of said complaint was entered into otherwise than mutually by the parties thereto, to-wit, Mary M. Smith and Sadie Hoffman; denies that the same was without consideration passing and given by the said Mary M. Smith to and received by the said Sadie Hoffman therefor, but on the contrary she avers and alleges that there was full and good consideration from the said Mary M. Smith to the said Sadie Hoffman for all the obligations and promises therein and thereby on the part of the latter to be performed.

(b) She denies that the understanding and agreement between the said Mary M. Smith and Sadie Hoffman in and about the making, delivering and entering into by and between them of the said agreement or contract was otherwise than is therein stated and set forth.

(c) Plaintiff admits upon her information and belief that on or about the 9th day of October, 1910, the said Mary M. Smith wrote a letter or writing to the said Sadie Hoffman of the terms and tenor set forth in said answer, but she avers and alleges that the same was the voluntary act of the said Mary M. Smith and that the same was and is wholly without consideration for anything therein contained; that the same was wholly without the knowledge of the plaintiff, and that she, plaintiff, has never consented

thereto, or in anywise acquiesced therein; and she denies that said letter or writing was intended to or did relieve the defendant from the obligations she had undertaken toward this plaintiff under and by virtue of said agreement or contract set forth in paragraph 2 of Division II of the complaint herein; and she denies that the last named agreement or contract was ever burned up, destroyed, or in anywise waived, annulled or set aside.

(d) Plaintiff denies that the ninth count or cause of action set forth in the complaint herein is barred by or under any statute of limitations of the State of Montana, or at all.

(e) She denies that the agreement or contract set forth in paragraph 2, Division II of the complaint herein has ever been rescinded, annulled, or held for naught.

WHEREFORE, plaintiff prays for judgment on the ninth count or cause of action set forth in the complaint as in said complaint prayed.

X.

As and for her reply or replication to the said answer which in anywise controverts the allegations of the complaint which set forth and allege the tenth count or cause of action in said complaint stated:

(a) She denies that the agreement or contract set forth in paragraph 2 of Division II of said complaint was entered into otherwise than mutually by the parties thereto, to-wit, Mary M. Smith and Sadie Hoffman; denies that the same was without consideration passing and given by the said Mary M. Smith to and

received by the said Sadie Hoffman therefor, but on the contrary she avers and alleges that there was full and good consideration from the said Mary M. Smith to the said Sadie Hoffman for all the obligations and promises therein and thereby on the part of the latter to be performed.

(b) She denies that the understanding and agreement between the said Mary M. Smith and Sadie Hoffman in and about the making, delivering and entering into by and between them of the said agreement or contract was otherwise than is therein stated and set forth.

(c) Plaintiff admits upon her information and belief that on or about the 9th day of October, 1910, the said Mary M. Smith wrote a letter or writing to the said Sadie Hoffman of the terms and tenor set forth in said answer, but she avers and alleges that the same was the voluntary act of the said Mary M. Smith and that the same was and is wholly without consideration for anything therein contained; that the same was wholly without the knowledge of the plaintiff, and that she, plaintiff, has never consented thereto, or in anywise acquiesced therein; and she denies that said letter or writing was intended to or did relieve the defendant from the obligations she had undertaken toward this plaintiff under and by virtue of said agreement or contract set forth in paragraph 2 of Division II of the complaint herein; and she denies that the last named agreement or contract was ever burned up, destroyed, or in anywise waived, annulled or set aside.

(d) Plaintiff denies that the tenth count or cause

of action set forth in the complaint herein is barred by or under any statute of limitations of the State of Montana, or at all.

(e) She denies that the agreement or contract set forth in paragraph 2, Division II of the complaint herein has ever been rescinded, annulled, or held for naught.

WHEREFORE, plaintiff prays for judgment on the tenth count or cause of action set forth in the complaint as in said complaint prayed.

WHEREFORE, plaintiff prays for judgment as in her complaint herein.

McINTIRE & MURPHY,
Plaintiff's Attorneys.

UNITED STATES OF AMERICA,
STATE OF MONTANA,
County of Lewis and Clark,—ss.

HOMER G. MURPHY, being duly sworn, says: That he resides in Helena, Lewis and Clark County, Montana; that he is one of the attorneys for plaintiff in the above entitled action, and as such makes this affidavit and verification in her behalf for the reason that the said plaintiff is not now within said county of Lewis and Clark, or within the State of Montana; that affiant has read the foregoing reply or replication, and knows the contents thereof, and that the matters and things therein contained are true to the best knowledge, information and belief of affiant.

Homer G. Murphy.

Subscribed and sworn to before me this 18th day

of November, 1920.

(SEAL)

Clara E. Bower,
Notary Public for the State
of Montana, residing at Hel-
ena, Montana. My commis-
sion expires Sept. 24th, 1921.

Due service of within Reply and receipt of a
copy thereof this 19th day of Nov., 1920, is hereby
admitted and acknowledged.

BELDEN & DeKALB,
GUNN, RASCH & HALL,
Attorneys for Defendant.

Filed: Nov. 19, 1920.

C. R. Garlow, Clerk.

That thereafter on the 3rd day of January, 1921,
defendant served and filed herein her motion for judg-
ment on the pleadings in words and figures following,
to-wit:

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF MONTANA.

OLLIE N. McNAUGHT,

Plaintiff,

vs.

SADIE HOFFMAN,

Defendant.

DEFENDANT'S MOTION FOR JUDGMENT.

Now comes the defendant in the said above entitled
cause, and moves the Court for judgment on the plead-
ings in said action, upon the ground that the said con-
tract or agreement between this defendant and Mary

M. Smith, set out in plaintiff's complaint, and upon which the plaintiff bases her claim and right to recover the monthly payments of \$50.00 each provided for in said contract, imposes no duty or obligation upon this defendant to make such payments, but whether she do so or not is optional with her, and the only remedy for defendant's failure to make such payment or payments is that provided for by the contract itself, and which remedy is exclusive, and of which only the other party to the contract, to-wit, Mary M. Smith, may avail herself.

This motion is based upon the pleadings on file in said cause; the decision of this Court, made and rendered herein upon the plaintiff's motion to strike out certain parts of the defendant's answer; and upon the plaintiff's demurrer to said answer; and upon the decision of the Supreme Court of the State of Montana, in the case of Smith v. Hoffman, 56 Mont. 299.

Dated this 3rd day of January, 1921.

BELDEN & DeKALB and
GUNN, RASCH & HALL,
Attorneys for Defendant.

Due service of within Motion and receipt of a copy thereof this 3rd day of Jan., 1921, is hereby admitted and acknowledged.

McINTIRE & MURPHY,
Attorneys for Plaintiff.

Filed: Jan. 3, 1921. C. R. Garlow, Clerk.

Thereafter on the January 6, 1921, plaintiff served and filed herein her counter motion for judgment on

the pleadings which is in the words and figures following, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF MONTANA.

OLLIE N. McNAUGHT,

Plaintiff,

vs.

SADIE HOFFMAN,

Defendant.

COUNTER-MOTION.

Comes now the above named plaintiff and as and for a counter-motion to that of defendant for judgment on pleadings in the present action she, said plaintiff, does now move the court that judgment on the pleadings herein in her favor and against said defendant in accordance with the prayer of the complaint be ordered and rendered.

Dated January 6, 1921.

McINTIRE & MURPHY,

Plaintiff's Attorneys.

Filed: Jan. 6, 1921.

C. R. Garlow, Clerk.

That thereafter on January 6, 1921, said motion of defendant for judgment on the pleadings herein and the counter-motion of plaintiff for judgment on the pleadings came on regularly for hearing, were argued by counsel, and by the court taken under advisement, and thereafter on January 7, 1921, rendered

its opinion on said motions, which opinion is in words and figures following, to-wit:

UNITED STATES DISTRICT COURT, MONTANA.

McNaught vs. Hoffman.

Herein, defendant's motion for judgment on the pleadings is granted, and plaintiff's like motion is denied.

The decision heretofore herein is conclusive—the law of conditions subsequent applies and plaintiff is without any right or remedy. It would be supererogatory to distinguish the cases cited by counsel. The last paragraph of said decision is inadvertence, and the motion therein determined had better been denied for that the complaint states no cause of action. Earlier in the decision the law of conditions subsequent appears clearly enough.

Bourquin, J.

Jan. 7, 1921.

Filed: Jan. 7, 1921. C. R. Garlow, Clerk.

That thereafter on January 24, 1921, judgment was duly rendered and entered herein, ⁱⁿ words and figures following, to-wit:

IN THE DISTRICT COURT OF THE UNITED
STATES, NINTH CIRCUIT, DISTRICT OF
MONTANA.

OLLIE N. McNAUGHT,

Plaintiff,

vs.

SADIE HOFFMAN,

Defendant.

JUDGMENT.

This cause came on duly and regularly to be heard on the 6th day of January, 1921, on defendant's motion for judgment in her favor and against said plaintiff on the pleadings herein, and on the counter-motion of plaintiff for judgment in her favor and against said defendant on the pleadings, the respective parties were represented by counsel who argued said motions which were thereupon submitted, whereupon the court sustained and granted the said motion of defendant and overruled and denied said counter-motion of the plaintiff, and ordered and rendered judgment herein in favor of said defendant and against said plaintiff which was done accordingly.

WHEREFORE, by virtue of the law, and by reason of the premises aforesaid it IS ORDERED AND ADJUDGED that said plaintiff, Ollie N. McNaught, take nothing by her said suit, and that the defendant, Sadie Hoffman, do hence go without day.

Judgment entered Jan. 24, 1921.

C. R. Garlow,
Clerk.

That thereafter on January 25, 1921, plaintiff filed her assignment of errors herein in words and figures following, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES, NINTH CIRCUIT, DISTRICT, OF MONTANA.

OLLIE N. McNAUGHT,

Plaintiff,

vs.

SADIE HOFFMAN,

Defendant.

ASSIGNMENT OF ERRORS.

Now comes the above named plaintiff, Ollie N. McNaught, by McIntire and Murphy, her attorneys, and with her petition for the allowance of a writ of error herein, presents and files this her assignment of errors, and by way thereof she avers and alleges that in the record and proceedings and in the judgment of said District Court in said cause, there is manifest error in this, to-wit:

1. The said District Court erred in overruling the demurrer of said plaintiff to the designated parts of defendant's answer herein;

2. The said District Court erred in not sustaining the demurrer of said plaintiff to the designated parts of defendant's answer herein;

3. The said District Court erred in overruling and denying the motion of said plaintiff to strike out the designated parts of defendant's answer herein:

4. The said District Court erred in not sustaining the motion of said plaintiff to strike out the designated parts of defendant's answer herein;

5. The said District Court erred in granting and sustaining the motion of defendant for judgment on the pleadings herein;

6. The said District Court erred in overruling and denying plaintiff's counter-motion for judgment on the pleadings herein in her favor and against said defendant.

7. The said District Court erred in ordering and entering judgment herein in favor of said defendant and against said plaintiff;

8. The said District Court erred in not ordering and entering judgment in favor of the plaintiff and against the defendant herein;

9. The said District Court erred in that the judgment ordered and entered herein in favor of said defendant and against said plaintiff is contrary to the admitted facts appearing on the pleadings herein, and is contrary to the law applicable to such facts.

WHEREFORE, and for divers other reasons appearing in the record and proceedings herein, said plaintiff in error prays that the judgment of the District Court in favor of said defendant and against said plaintiff be reversed and set aside; that this Honorable Court do order the said District Court to order and enter judgment in favor of said plaintiff and against said defendant in accordance with the prayer of plaintiff's complaint herein; and for such relief as may

be just.

Dated Jan. 25th, 1921.

McINTIRE & MURPHY,
Attorneys for Plaintiff in Error.
Plaintiff in the Court below.

Filed: Jan. 25, 1921. C. R. Garlow, Clerk.

On January 25, 1921, petition for writ of error was duly filed herein in words and figures following, to-wit:

IN THE DISTRICT COURT OF THE UNITED
STATES, NINTH CIRCUIT, DISTRICT OF
MONTANA.

OLLIE N. McNAUGHT,

Plaintiff,

vs.

SADIE HOFFMAN,

Defendant.

PETITION FOR WRIT OF ERROR.

TO THE HONORABLE, THE JUDGE OF SAID
COURT:

Now comes the said Ollie N. McNaught, the plaintiff herein, and says that on the 24th day of January, 1921, at the November Term, 1920, of the said court a judgment was rendered and entered in favor of the defendant in the above entitled cause, and against the said plaintiff in which said judgment and the record of proceedings had prior thereto in said cause certain manifest errors have intervened to the great prejudice of said plaintiff, which errors are specified in detail

in the assignment of errors which is filed with this petition; wherefore the plaintiff in the above entitled cause feeling herself aggrieved by the judgment of the Court rendered thereon and entered herein, comes now by McIntire and Murphy, her attorneys, and petitions said Court for an order allowing said plaintiff to prosecute a writ of error to the Honorable The United States Circuit Court of Appeals for the Ninth Circuit under and according to the laws of the United States in that behalf made and provided for the correction of the errors so complained of; and also that an order be made fixing the amount of security which the said plaintiff shall give and furnish upon said writ of error and that upon the giving of such security all further proceedings in this court shall be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit; and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to said Circuit Court of Appeals.

And the said plaintiff herewith presents her assignment of errors in accordance with the rules of said United States Circuit Court of Appeals, and the course and practice of this Honorable Court.

And your petitioner will ever pray.

McINTIRE & MURPHY,

Attorneys for Plaintiff.

Filed: Jan. 25, 1921.

C. R. Garlow, Clerk.

That on January 25, 1921, an order allowing writ of error and fixing bond was duly made and entered

herein in words and figures following, to-wit:

IN THE DISTRICT COURT OF THE UNITED
STATES, NINTH CIRCUIT, DISTRICT OF
MONTANA.

OLLIE N. McNAUGHT,

Plaintiff,

vs.

SADIE HOFFMAN,

Defendant.

ORDER ALLOWING WRIT OF ERROR, etc.

This 25th, day of January, 1921, came the above named plaintiff, by her attorneys, and filed herein and presented to the Court her petition praying for the allowance of a writ of error intended to be urged by her, praying, also, that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the Court does allow the writ of error upon the said plaintiff giving bond according to law, in the sum of Three hundred dollars, which shall operate as a supersedeas bond.

BOURQUIN,

Judge.

Filed and entered: Jan. 25, 1921. C. R. Garlow,
Clerk.

Thereafter on January 25, 1921, bond on writ of error was duly filed herein being in words and figures following, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES, NINTH CIRCUIT, DISTRICT OF MONTANA.

OLLIE N. McNAUGHT,

Plaintiff,

vs.

SADIE HOFFMAN,

Defendant.

BOND.

KNOW ALL MEN BY THESE PRESENTS: That we, OLLIE N. McNAUGHT, as principal, and AMERICAN SURETY COMPANY OF NEW YORK, a corporation, as surety, are held and firmly bound unto the above named Sadie Hoffman, defendant in error herein, in the full and just sum of Three hundred dollars (\$300.00), to be paid to the said Sadie Hoffman, her heirs, executors, administrators or assigns, for the payment of which well and truly to be made we bind ourselves, our successors, assigns, executors and administrators jointly and severally by these presents.

Signed and dated this 25th day of January, A. D. 1921.

WHEREAS lately at a regular term of the District Court of the United States for the District of Montana, sitting at Helena, Montana, in said District Court

in the above entitled action, final judgment was rendered against the said Ollie N. McNaught, and the said Ollie N. McNaught has obtained a writ of error and filed a copy thereof in the Clerk's office of the said court to reverse the judgment of the said court in the aforesaid matter and a citation directed to the said Sadie Hoffman, defendant in said proceeding, and her attorneys, Messrs. Belden & DeKalb, & Gunn, Rasch & Hall, citing her to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in San Francisco, in the State of California, according to law, within thirty days from the date hereof.

Now the condition of the above obligation is such that if the said Ollie N. McNaught shall prosecute her writ of error to effect and answer all damages and costs and comply in all respects with the said judgment if she fails to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

OLLIE N. McNAUGHT,
Principal.

By H. G. McINTIRE,
HOMER G. MURPHY,
Her Attorneys.

American Surety Company of New York

By W. D. Habish

Resident vice president.

Attest:

F. M. Scharpf

Resident assistant secretary.

(Corporate Seal)

STATE OF MONTANA,
County of Lewis and Clark,—ss.

On this 25th day of January, 1921, before me, Clara E. Bower, a notary public for the State of Montana, residing in the city of Helena, came W. D. Habish, resident vice president of the American Surety Company of New York, to me personally known to be the resident vice president of said American Surety Company, a corporation, described in and which executed as surety the annexed bond, and being by me first duly sworn, stated that he, as resident vice president and F. M. Scharpf as resident assistant secretary, duly executed the preceding instrument by order and authority of the directors of the said American Surety Company, and that the seal affixed to the preceding instrument is the corporate seal of the said company, that the said corporate seal was duly affixed by the authority of the directors of the said company; that the said American Surety Company is duly and legally incorporated under the laws of the State of New York, is authorized under its charter to transact and is transacting the business of a Surety Company in the State of Montana; that said company has complied with all the laws of the State of Montana relating to surety companies doing business in that State; and is duly licensed and legally authorized by said State to qualify as sole surety on the bond hereto annexed; that the said company is authorized by its Articles of Incorporation and by its by-laws to execute the said bond; and that said company has assets consisting of capital stock paid in cash and surplus over and above

all liabilities of every kind exceeding the sum of One Million Dollars, and that said affiant, and F. M. Scharpf have been duly authorized by the Board of Directors of the company to execute the foregoing bond.

W. D. Habish

Subscribed and sworn to before me this 25th day of January, 1921.

(SEAL)

Clara E. Bower,
Notary Public for the State of
Montana, Residing at Helena,
Montana. My commission ex-
pires Sept. 24, 1921.

The foregoing bond is hereby approved January 25, 1921.

Bourquin, Judge.

Filed: Jan. 25, 1921. C. R. Garlow, Clerk.

That thereafter on January 25, 1921, writ of error was duly issued herein, which writ is hereto annexed and is in words and figures following, to-wit:

IN THE DISTRICT COURT OF THE UNITED
STATES, NINTH CIRCUIT, DISTRICT OF
MONTANA.

OLLIE N. McNAUGHT,

Plaintiff,

vs.

SADIE HOFFMAN,

Defendant

WRIT OF ERROR.

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable Judge of the District Court of the United States for the District of Montana, GREETING:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said District Court before you between Ollie N. McNaught, plaintiff, and Sadie Hoffman, defendant, a manifest error has happened to the damage of said Ollie N. McNaught, as by her complaint appears, and we being willing that error, if any hath been, should be corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you if judgment be therein given, that under your seal you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this Writ, so that you have the same at San Francisco, in the State of California, where said Court is sitting,

within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held, and the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals, may cause further to be done therein to correct the error what of right, and according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, this the 25th day of January, 1921.

C. R. Garlow,
Clerk U. S. District Court,
District of Montana.

By H. H. Walker,
Deputy Clerk of the United
States District Court for the
District of Montana.

The above writ of error is allowed this 25th day of January, 1921.

Bourquin,
District Judge.

We hereby this 25th day of January, 1921, accept due personal service of the foregoing writ of error on behalf of the defendant in error and acknowledge receipt of a true copy of said writ of error.

BELDEN & DeKALB,
GUNN, RASCH & HALL,
Attorneys for Defendant in Error.

Filed: Jan. 25, 1921.

C. R. Garlow, Clerk.

That thereafter on January 25, 1921, a citation on

said writ of error was duly issued herein, which citation is hereto attached and is in words and figures following, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES, NINTH CIRCUIT, DISTRICT OF MONTANA.

OLLIE N. McNAUGHT,

Plaintiff,

vs.

SADIE HOFFMAN,

Defendant.

CITATION ON WRIT OF ERROR.

UNITED STATES OF AMERICA,—ss.

THE PRESIDENT OF THE UNITED STATES TO SADIE HOFFMAN, DEFENDANT IN ERROR, and HER ATTORNEYS, MESSRS. BELDEN & DeKALB and GUNN, RASCH & HALL, GREETING:

You are hereby cited and admonished to be and appear at a session of the United States Court of Appeals for the Ninth Circuit to be held in the city of San Francisco, State of California, within thirty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the District of Montana, wherein Ollie N. McNaught is palintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not

be done to the parties in that behalf.

WITNESS the Honorable GEORGE M. BOURQUIN, Judge of the United States District Court for the District of Montana, this 25th day of January, A. D. 1921, and of the Independence of the United States the 145th year.

Bourquin,
District Judge.

ATTEST:

C. R. Garlow
Clerk U. S. District Court,
District of Montana.

By H. H. Walker,
Deputy Clerk United States District
Court, District of Montana.

(SEAL)

We hereby this 25th day of January, 1921, accept due personal service of the foregoing citation on writ of error on behalf of the defendant in error and acknowledge receipt of a true copy of said citation on writ of error.

BELDEN & DeKALB,
GUNN, RASCH & HALL,
Attorneys for Defendant in Error.

Filed: Jan. 25, 1921. C. R. Garlow, Clerk.

That thereafter on January 25, 1921, praecipe for transcript of record was served and filed herein and is in words and figures following, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES, NINTH CIRCUIT, DISTRICT OF MONTANA.

OLLIE N. McNAUGHT,

Plaintiff,

vs.

SADIE HOFFMAN,

Defendant.

PRAECIPE FOR TRANSCRIPT OF RECORD.

TO THE CLERK OF THE ABOVE ENTITLED COURT:

You will please prepare transcript of the record in this cause, to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, under the writ of error heretofore allowed by said court, and include in the said transcript the following pleadings, proceedings, and papers on file, to-wit:

Plaintiff's complaint; defendant's demurrer to plaintiff's complaint; defendant's answer; plaintiff's demurrer to parts of said answer; plaintiff's motion to strike out parts of said answer; order of court overruling and denying said demurrer and motion together with the memorandum opinion of the court thereon; plaintiff's replication to defendant's answer; defendant's motion for judgment on the pleadings; plaintiff's counter-motion for judgment on the pleadings; the order of court disposing of said last mentioned motions together with such memorandum opinion as the court

may have made thereon; the judgment made and entered herein; the several minute entries and orders made and entered herein; the petition for writ of error and the allowance thereof; assignment of errors; the bond on writ of error and approval thereof; the writ of error with the return thereto; the citation with proof of service thereof. Such transcript to be prepared as required by law and the rules of this court and the rules of the court of the United States Circuit Court of Appeals for the Ninth Circuit and to be on file in the office of the clerk of said Circuit Court at San Francisco, California, within thirty days from the signing of said citation, to-wit, ~~January 25~~^{Feb. 24}, 1921.

McINTIRE & MURPHY,
Attorneys for Plaintiff in Error.

Due service service of within Praecept and receipt of copy thereof this 25th day of January, 1921, is hereby admitted and acknowledged.

BELDEN & DeKALB,
GUNN, RASCH & HALL,
Attorneys for Plaintiff.

Filed: Jan. 25, 1921.

C. R. Garlow, Clerk.

ANSWER OF COURT TO WRIT OF ERROR.

The answer of the Honorable, the District Judge of the United States for the District of Montana, to the foregoing writ:

The record and proceedings whereof mention is within made, with all things touching the same, I certify, under the seal of the said District Court of

the United States, to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within I am commanded.

By the Court:

(SEAL)

C. R. Garlow,
Clerk.

Thereafter on the 21st day of February, 1921, there was filed and entered herein a stipulation for and order for enlargement of time in which to file record in the Circuit Court of Appeals in words and figures following, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

OLLIE N. McNAUGHT,

Plaintiff,

vs.

SADIE HOFFMAN,

Defendant.

STIPULATION FOR ENLARGEMENT OF TIME
IN WHICH TO FILE RECORD IN CIRCUIT
COURT OF APPEALS.

WHEREAS, on January 25th, 1921, a Writ of Error to the United States District Court for the District of Montana was duly allowed and issued on behalf of the plaintiff, Ollie N. McNaught, in the above entitled cause, pursuant to an Order of Court author-

izing the issuance of the same, and citation was duly issued and served on said date; and,

WHEREAS, unavoidable delay has occurred in printing the transcript of the Record on said Writ of Error;

NOW, THEREFORE, it is hereby stipulated and agreed, by and between plaintiff, Ollie N. McNaught, and the defendant, Sadie Hoffman, that the time in which to make return to said writ of error in the United States Circuit Court of Appeals for the Ninth Circuit is hereby enlarged and extended for a period of thirty days, in addition to the time prescribed by the rules of said Circuit Court of Appeals, and that the plaintiff in error, Ollie N. McNaught, may have such additional time in which to file the record in said cause and docket the same in the office of the Clerk of said United States Circuit Court of Appeals at San Francisco.

And consent is hereby given that an order may be made by the Judge of the United States District Court, for the District of Montana, who allowed said writ of error and signed the citation, enlarging the time for the making of said return and the filing of said record, in accordance with this stipulation.

McINTIRE & MURPHY,

Attorneys for Plaintiff in Error.

BELDEN & DeKALB,

GUNN, RASCH & HALL,

Attorneys for Defendant in Error.

ORDER.

For good cause shown, IT IS HEREBY ORDERED that the plaintiff, Ollie N. McNaught, have, and she is hereby granted thirty days, in addition to the time prescribed by the rules of the United States Circuit Court of Appeals, for the Ninth Circuit, in which to make return to the writ of error issued herein and file the record in said cause and docket the same in the office of the Clerk of said Circuit Court of Appeals.

Dated this 21st day of February, 1921.

Bourquin,
District Judge.

Entered and filed Feb. 21, 1921.

C. R. Garlow, Clerk.

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO TRANSCRIPT OF RECORD.

UNITED STATES OF AMERICA,

District of Montana,—ss.

I, C. R. GARLOW, Clerk of the United States District Court in and for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume consists of.....pages, numbered consecutively from 1 to....., inclusive, and is a true, full and correct transcript of the record and all proceedings had in said cause and of the whole

thereof, including all the pleadings, orders, opinion of the court and judgment, together with petition for writ of error, assignments of error, order allowing writ of error, bond, writ of error, citation on writ of error, præcipe for transcript and answer of court to writ of error, as appears from the original records and files of said court in my possession as said clerk; and I further certify and return that I have annexed to said transcript and included within said paging, the original writ of error and citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of ~~Fifty seven~~ ⁸⁰/₁₀₀ Dollars (\$ 57.80), and have been paid by the plaintiff in error.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, at Helena, Montana, this.....5.....day of March....., A. D. 1921.

Court Seal

E. R. Garland
Clerk of the United States District
Court for the District of Montana.
By H. H. Walba - Deputy

